TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~311~~ 91.

MRS. CAMILLE CAHEN, MRS. JULIE KAHN, EVA CAHEN, ET AL., PLAINTIFFS IN ERROR,

vs.

JOHN BREWSTER, TAX COLLECTOR FOR THE SECOND DISTRICT OF THE CITY OF NEW ORLEANS, STATE OF LOUISIANA, AND ANDREW H. WILSON, PRESIDENT SCHOOL BOARD OF THE CITY OF NEW ORLEANS, STATE OF LOUISIANA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED JULY 28, 1905.

(19,863.)

(19,863.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 361.

MRS. CAMILLE CAHEN, MRS. JULIE KAHN, EVA CAHEN, ET AL., PLAINTIFFS IN ERROR,

vs.

JOHN BREWSTER, TAX COLLECTOR FOR THE SECOND DISTRICT OF THE CITY OF NEW ORLEANS, STATE OF LOUISIANA, AND ANDREW H. WILSON, PRESIDENT SCHOOL BOARD OF THE CITY OF NEW ORLEANS, STATE OF LOUISIANA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

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a UNITED STATES OF AMERICA:

Supreme Court of the State of Louisiana.

Succession of MATHIAS LEVY. No. 15610.

Gustave Lemle, and Charles Rosen, for plaintiffs in error.
F. C. Zacharie, and M. M. Boatner, for defendant in error.

Writ of error to the supreme court of the State of Louisiana from the Supreme Court of the United States of America, returnable at the city of Washington, D. C., within thirty days (30) from the seventh day of July, A. D. 1905.

Transcript of Record.

1 STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans.

Civil District Court for the Parish of Orleans.

Petition for Probate of Will and Order Thereon.

Filed May 30th, 1904.

Civil District Court, Division "A."

Succession of MATHIAS LEVY. No. 73654.

To the honorable judges of the civil district court for the parish of Orleans, State of Louisiana:

The petition of William Adler a-d Mrs. Cerf Hirsch, widow of Cerf Hirsch, both residing and domiciled in this city, with respect represents:—

That Mathias Levy, who resided and was domiciled in this city, died in this city on May 26th., 1904, leaving property real and personal within the jurisdiction of this honorable court:

That said decedent left a last will and testament in noncupative form by public act, certified whereof is hereunto annexed and made a part hereof; that said will names your petitioner- as joint executors without bond;

2 That your petitioners are willing to accept said trust, and desire said will to be probated and letters testamentary issue to them all according to law.

Wherefore petitioners pray that said will be ordered filed registered, probated and executed, according to law; th-t letters testamentary do issue to petitioners, without bond, upon their taking the necessary oath and complying with the requisites of law; for all further necessary orders, for costs, and for general relief.

(Signed) CHARLES ROSEN,
Attorney for Petitioners.

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans.

Before me, the undersigned notary public in and for said parish and State, duly commissioned and qualified, personally came and appeared William Adler and Louis Kohlman, both residents of this city, who being duly sworn depose and say :—

That they were well acquainted with the late Mathias Levy ; that said Mathias Levy died in this city on May 26th., 1904 ; and that all the facts and allegations contained in the above and foregoing petition are true and correct.

(Signed) WILLIAM ADLER.
(Signed) LOUIS KOHLMANN.

Sworn to and subscribed before — this 30th., day of May, 1904, at New Orleans, Louisiana.

(Signed) CHARLES ROSEN,
Notary Public.

Order Attached to Above Petition for Probate of Will.

Let the last will and testament of the deceased made in the noncupative form by public act before Charles Rosen, notary public on the 23rd., of December 1903, be filed approved and registered and executed according to law let petitioners be confirmed as
3 executors thereunder and letters as such issue on their taking the oath as prescribed by law.

New Orleans May 30th, 1904.

(Signed) T. C. W. ELLIS, Judge.

Will and Testament of Mathias Levy.

Filed May 30th, 1904.

UNITED STATES OF AMERICA,
State of Louisiana, Parish of Orleans,
City of New Orleans.

Be it known, that on this twenty third day of the month of December in the year one thousand nine hundred and three, at the hour of half past two o'clock in the afternoon,

Before me Charles Rosen, a notary public in and for the parish of Orleans, State of Louisiana, duly commissioned and qualified, and in the presence of Messieurs Leon, Cahn, Jacob Hirsch, Jacob Weil Hirsch, Raoul Joseph Adler, and Jacob Weinberger, all competent male witnesses of the full age of majority, residing in the city of New Orleans, parish of Orleans, State of Louisiana.

Personally came and appeared at my office, number 317 Hennen building, corner of Common and Carondelet streets, in the city of New Orleans, State of Louisiana,

Mathias Levy, a resident of the city of New Orleans, State of Louisiana, who declared unto me, notary, in the presence of all the aforesaid and undersigned witnesses that he wished to make his last will and testament and that he wished me, notary to receive his last will and testament, and he, the said Mathias Levy, testator, dictated to me notary this his last will and testament in a loud and audible, and distinct voice in the presence and hearing of all of said witnesses, and I notary received said last will and testament as dictated and wrote
4 down in the presence of all of said witnesses and of said testator said last will and testament as dictated to me by said testator, in words and figures following towit:

"I leave to my sister-in-law, Henriette Levy, living in France, the sum of two hundred dollars.

I leave to each of the children of my niece, Camille Cahen living in France, one thousand dollars.

I leave to Mathias, Yeom, Susanne and Esther Kahn, the children of my niece, Julie Kahn, living in France, to each the sum of one thousand dollars.

I leave to Eva Cahen, the daughter of Camille Cahen, solitaire diamond ring; to Jeanne Cahen, daughter of Camille Cahen, diamond breastpin; to Armand Cahen, son of Camille Cahen, gold Tabias watch; to Leon Cahen, son of Camille Cahen, the other watch; and to Yeom Kahn, daughter of Julie Kahn, diamond ring cluster, all these articles being in my bank box. I leave diamond ear-rings to Julie Kahn.

I leave to Miss Clementine Cahen, 43 Rue Rambuteau, Paris, one thousand dollars.

I leave to Temple Sinai of this city, one hundred dollars.

I leave to Touro infirmary of this city two hundred dollars in memory of myself and two hundred dollars in memory of my deceased sister, Esther.

I leave to the Jewish Home of this city two hundred dollars.

I desire my executors to expend five hundred dollars ($500.00) for a tombstone for me, one hundred dollars for my funeral expenses; and one hundred dollars for a burial lot for me; and that they place a coping around the grave of my deceased brother Michel Levy.

I leave the balance of my estate to my two nieces Camille Cahen and Julie Kahn, in equal shares.

I name William Adler and Mrs. Cerf Hirsch my joint executors without bond.

I revoke all prior wills and declare this my last will and
5 testament."

It was thus that the foregoing last will and testament was dictated to me by said testator in a loud, audible, and distinct voice in the presence and hearing of all of the aforesaid witnesses and the

same was received by me and written down by me notary in my own proper handwriting in the presence of said testator and of all of said witnesses, as it was dictated by said testator and I notary then read the said last will and testament of the said testator in a loud, audible and distinct voice in the presence and hearing of all of said aforenamed witnesses, and the said testator then and there declared in the presence and hearing of all, of said witnesses that he fully understood the same and persisted in the contents thereof, the whole of the foregoing at one time without interruption and without turning aside to other acts.

Thus dictated, received, written, read, done and signed on the day and date at the hour and place named, and the said will was then and there signed by said testator in the presence of all of said witnesses and me notary, by all of said witnesses each in the presence of the other of said testator and of me, notary, and by me notary in the presence of said testator and of all of the said witnesses, the whole of the foregoing at one time without interruption and without turning aside to other acts.

(Original signed) LEON CAHEN.
JACOB HIRSCH.
J. W. HIRSCH.
RAOUL J. ADLER.
JACOB WEINBERGER.
MATHIAS LEVY.
CHARLES ROSEN,
Notary Public.

[SEAL.]

I hereby certify that the above and foregoing is a true and correct copy of the original thereof on file in my office. Witness my hand and seal of office at New Orleans, Louisiana, this twenty-fourth day of December, 1903.

(Signed) CHARLES ROSEN,
Notary Public.

6 Inventory.

Filed June 13th, 1904.

Inventory.

Civil District Court, Division "A."

Succession of MATHIAS LEVY. No. 73654.

Be it known that on this ninth day of June, in the year of our Lord one thousand nine hundred a-d four, and of the Independence of the United States of America the one hundred and twenty eight.

By virtue of and pursuant to an order rendered by the Honorable T. C. W. Ellis, judge of division "A" of the civil district court for the

parish of Orleans and on the 31st., day of May, 1904 on the petition of William Adler and Mrs. Cerf Hirsch the duly sworn and testamentary executors of the last will and testament of Mathias Levy, deceased, which order directs me, Abraham Goldberg, the undersigned notary, to take an inventory of the property and effects belonging to the estate of the deceased, Mathias Levy, a certified copy of which petition a-d order is hereto annexed, and in the presence of:

First. William Adler and Mrs. Cerf Hirsch, the duly sworn and qualified testamentary executors under the last will and testament of Mathias Levy, deceased;

Second. Gus Lemle, attorney to represent the absent heirs appointed by order of court of May 31st., 1904;

Third. P. Norbert Gravois and Jacob Hirsch, both residents of the city of New Orleans, of the full age of majority, appearing and acting as appraisers, appointed by me, notary, and duly qualified and sworn by me as such appraisers to make a true and fair appraisement of the property of the deceased;

Fourth. Harry H. Waters and Scott E. Beer, competent witnesses, both residents of the city of New Orleans;

7 I, Abraham Goldberg, a notary public, duly commissioned sworn and qualified, in and for the parsih of Orleans, State of Louisiana, proceeded with all the parties above named, to the Germania national bank, in this city, and there at the hour of 10 a. m., on June 4th., 1904, did take an inventory of the property of the deceased as follows, to-wit:—

Contents of Bank Box of Mathias Levy, No. 87, in the Germania National Bank.

	Appraised at—
2 pairs of eyeglasses	$2.50
1 pewter box	.50
1 silver soup ladle	8.00
1 dozen large silver table spoons	20.00
15 silver tea spoons	10.00
1 dozen large silver forks	20.00
3 silver berry spoons	12.00
1 dozen silver forks	15.00
1 butter knife and three salt spoons	2.00
1 dozen large antique silver forks with monogram	50.00
1 dozen silver dessert spoons	15.00
	155.00
18 United States four per cent., consols of $500.00 each: Nos. 1853 to 1870 inclusive registered to the order of Mathias Levy, issued July 1st., 1877, being thirty year bonds	9630.00
30 $20.00 bills, United States currency	600.00
40 $10.00 bills, United States currency	400.00
1 check of the United States Government	90.00
	$10875.00

Memoranda.

2 packages of tax receipts and old papers:
6 $1.00 notes of the Bank of Louisiana;
10 $2.00 notes of the Bank of Louisiana;
6 $3.00 notes of the Bank of Louisiana;
4 $5.00 notes of the Bank of Louisiana;
3 $10.00 notes of the Bank of Louisiana;
8 1 $20.00 note of the Bank of Louisiana;
2 $2.00 notes of the city of New Orleans issued October 24th., 1862.
17 packages of old papers.

The inventory of the property at the Germania national bank having been completed, I, the said notary, together with all the parties hereto proceeded to the Peoples Bank & Trust Company of this city, and there at the hour of 11:30 a. m., of June 4th., 1904, did take the following inventory of the property of the deceased as follows:

Contents of Bank Box of Mathias Levy, No. 852, in Peoples Bank & Trust Company.

	Appraised at—
1 Tobias gold watch	$50.00
1 diamond ring	150.00
1 diamond ring	50.00
1 gold mounting	2.00
1 gold watch and case	40.00
1 diamond breast pin	150.00
2 diamond studs	50.00
1 diamond cluster pin	50.00
1 topaz pin	1.00
1 piece of old gold	.50
1 pair of diamond ear-rings	150.00
	693.50
7 $20.00 gold coins	140.00
1 $10.00 gold coins	10.00
2 $5.00 gold coins	10.00
1 20 gold franc gold coin	4.00
1 certificate No. 41 for 13 shares of the capital stock of the Southern Insurance Company, of New Orleans of the par value of $100.00 each	1365.00
20 $50.00 United States four per cent. consols, issued July 1st., 1877, with coupons No. 91 due April 1st, 1900 to coupons 120 inclusive attached. Said bonds being numbered 4424 to 4434 inclusive; 3064 to 3067 inclusive; 4419 to 4423 inclusive	1230.00

9

2 bonds of 500 francs each of the Paris to Lyon- and Mediterranean railroad, with coupons Nos. 65 to 88 inclusive, bearing three per cent., being series No. 8769 and No. 22,110.....	250.00
Credit with Lazard Freres, of Paris, 483.90 francs.....	1500.00
1 note of date January, 29th., 1904, payable three months after date, for $18,000.00 with six per cent. interest from maturity, secured by collateral as follows.....	18100.00
	$23302.50

145 shares of the capital stock of the New Orleans & Central American Trading Co. 4 notes of John W. Brown, Joseph N. Brown and Edgar P. Brown of $1200.00 each, due respectively January 1st., 1905, January 1st., 1906 January 1st., 1907, January 1st., 1908.

1 note of R. L. Cordill for $500.00, dated March 22nd., 1902, and *ude* two years after date.

2 notes of L. Stephens of $1,000.00 each.

2 mortgage notes of Jack Strange, dated November 3rd., 1903, 1 for $1,000.00, payable October 1st., 1904, and 1 for $2,000.00, payable October 1st., 1905, with eight per cent. interest from date, in accordance with act of mortgage passed before Charles Rosen, notary, November 3rd., 1903.

Cash in Various Banks.

Balance as per deposit book in Canal Bank & Trust Co...	$11690.26
Balance as per deposit book in State national bank.....	6106.03
Balance as per deposit book in Germania national bank..	3987.20
Balance as per deposit book in Peoples Bank & Trust Co..	1301.98
	23085.47

Real Estate.

A lot of ground, with the buildings thereon situated in the second district of this city in the square bounded by Old Levee, Conti, Bienville and Chartres streets, designated by the number 11 on a plan drawn by A. Samson, deposited in the office of H. P. Caire, late notary public as plan No. 6 of his book of plans which lot measures 20′ 2″ 5‴ front on Conti street by 63′ 0″ 9‴, more or less in depth between parallel lines, bounded on one side by lot No. 9 and on the other side by lot No. 13.

Acquired by purchase from Tiblier, *et als.*, by act before Theodore Buisson, notary public, on August 31st., 1875, registered in Conveyance Office Book 103, folio 955, appraised at $1800.00.

When knowing of nothing else, and nothing else being pointed out to us, I the undersigned notary have made the following recapitulations:

Contents of bank box in Germania national bank.....	$10875.00
Contents of bank box in Peoples Bank & Trust Co.....	23302.50
Cash in various banks of this city	23085.97
Real estate	1800.00
Grand total.....	$59062.47

Thus done and signed at my office, in the city of New Orleans on the day month and year first above written, in the presence of the witnesses above named, who have hereunto signed their names together with the testamentary executors, the attorney for absent heirs, the appraisers and me, notary, after due reading of the whole.

(Orignal signed) WILLIAM ADLER.
MRS. CERF HIRSCH.
GUSTAVE LEMLE.
P. NOBT. GRAVOIS.
JACOB HIRSCH.
ABRAHAM GOLDBERG, Not. Pub.

Witnesses:
H. H. WATERS.
SCOTT E. BEER.

[SEAL.] A true copy.
(Signed) ABRAHAM GOLDBERG, Not. Pub.

11 Supplemental Inventory.

Filed August 3rd, 1904.

Supplemental Inventory.

Civil District Court, Division "A."

Succession of MATHIAS LEVY. No. 75654.

Be it known that on this second day of August, in the year of our Lord, one thousand nine hundred and four and of the Independence of — America, the one hundred and twenty ninth;

By virtue of and pursuant to an order rendered by the Hon. T. C. W. Ellis, judge of division "A" of the civil district court for the parish of Orleans, on the 28th., of June, 1904, on the petition of William Adler and Mrs. Cerf Hirsch, duly qualified testamentary executors of the last will and testament of Mathias Levy deceased, which order directs me, Abraham Goldberg, the undersigned notary to take a supplemental inventory of the property and effects belonging to the estate of the deceased, a certified copy of which petition and order is hereto annexed, and in the presence of;

1. William Adler and Mrs. Cerf Hirsch, duly qualified testamentary executors under the last will and testament of Mathias Levy, deceased;

2. Gus Lemle, attorney, representing the absent heirs appointed by order of court on May 31, 1904;

3. P. Norbert Gravois and Jacob Hirsch, both residents of the city of New Orleans of the full age of majority, appearing and acting as appraisers, appointed by me, notary, and duly qualified and sworn by me as such appraisers, to make a fair and true appraisement of the property of the deceased;

4. Harry H. Waters and Scott E. Beer, competent witnesses, both residents of the city of New Orleans;

I Abraham Goldberg, notary public, duly commissioned,
12 sworn and qualified, in a-d for the parish of Orleans, State of Louisiana, in the presence of all the parties above named, did make a supplemental inventory of the property of the deceased, as follows, to-wit:

Cash on deposit in the Importers & Traders National Bank of New York City, 5613.58

Thus done and signed at my office in the city of New Orleans on the day, month and year first above written, in the presence of the witnesses above named, who have hereunto signed their names, together with the testamentary executors, the attorney for the absent heirs, the appraisers and me, notary after due reading of the whole.

(Original signed) GUSTAVE LEMELE,
Att'y for Absent Heirs.
MRS. CERF HIRSCH.
WM. ADLER.
P. NOBT. GRAVOIS.
JACOB HIRSCH.
ABRAHAM GOLDBERG, Not. Pub.

Witnesses:
SCOTT E. BEER.
H. H. WATERS.

A true copy.
(Signed) ABRAHAM GOLDBERG, Not. Pub.

[SEAL.]

13 Final Account and Tableau of Distribution.

Filed August 30*th*, 1904.

Civil District Court, Parish of Orleans, Division "A."

Succession of MATHIAS LEVY. No. 73654.

Final Account and Tableau of Distribution.

Assets.

Cash, as per Inventory.

Cash from 30 $20 bills, U. S. currency	$600.00
Cash from 40 $10 bills, U. S. currency	400.00
Cash from Lazard Freres	1,518.20
Cash from promissory note paid	1,814.00
Cash from Canal Bank & Trust Co	11,690.26
Cash from State national bank	6,106.03
Cash from Germania national bank	3,987.20
Cash from Peoples trust & savings bank	1,301.98
Cash from check U. S. Government	90.00
Cash from check U. S. Government, received since inventory taken	90.00
Total cash on hand	$43,924.67

Cash, as per Supplemental Inventory.

On deposit in Importers & Traders Nat. Bank of New York	5,613.58	
Less 5% inheritance tax, due under laws of New York	280.67	
		5,332.91
Cash, received from rents of real estate, to Aug., 1, 1904		45.00
Total		$49,302.58

14 Liabilities.

The above amount of cash will be paid as follows:
A. Adler & Co. for disbursement as follows:

James Prevost (insurance)	6.50
Rita Saucier (translation)	2.50
Charles Miclelson (watching body)	10.00
E. Sambula (attendance)	5.00
Julia Bell (laundry)	1.50
Mays' drug store (drugs)	15.00
Kaufman, Flonacher & Cahn (clothing)	6.00

C. Lazard & Co. (clothing)	11.10
J. Harris (attendance)	5.00
M. Hutton (services)	22.85
Mrs. M. L. Cano (room and board)	118.00
J. A. Mailhes (drugs)	5.30
Mrs. M. L. Cook (nurse)	20.00
Touro synagogue (pew)	30.00
Burial ground commissioners (lot)	50.00
State national bank (cash)	10.00
State national bank (cash)	6.50
Touro infirmary (treatment)	133.00
Cash	50.00
Jahncke Nav. Co.	3.75
	512.98
A. Shwartz & Son	13.00
I. Sontheimer & Son, undertaker	141.00
Abr-ham Goldberg, notary for inventory and supplemental inventory	300.00
J. Hirsch and P. N. Gravois, appraisers, $50. each	100.00
Charles Rosen, attorney for executors	4000.00
Gustave Lemle, attorney for absent heirs	2500.00
15 Wm. Adler and Cerf Hirsch, jointly commission as executors, 2½ % on amount of inventory a-d supplemental inventory	1612.13
Costs expended and reserved	100.00
Dr. Wm. Kohlmann, bill for services	2000.00
Dr. P. L. Reiss, bill for services	150.00
Dr. L. Sexton, bill for services	125.00
J. Hirsch, bill for nursing	444.00
Total	11998.11

Cash Legacies to be Paid in Accordance with Provisions of Will.

Henriette Levy	200.00
Children of Camille Cahen, viz:	
Eva Cahen	1000.00
Jeanne Cahen	1000.00
Armand Cahen	1000.00
Leon Cahen	1000.00
Children of Julie Kahn, viz:	
Mathias Kahn	1000.00
Yeom Kahn	1000.00
Susanne Kahn	1000.00
Esther Kahn	1000.00

Miss Clementine Cahen, 43 Rue Ramututeau, Paris	100.00
Temple Sinai of New Orleans	100.00
Touro infirmary of New Orleans	400.00
Jewish Home of New Orleans	200.00

Amounts Retained by Executors to be Expended by Them in Accordance with Will.

For tombstone	500.00	
For coping	250.00	
		750.00
Total cash disbursements		$21748.11
Balance cash		27554.47
		$49302.58

Said balance of cash to be paid in equal proportions to the
16 universal legatee-, Camille Cahen and Julie Kahn.

Legacies in Kind.

The following legacies are to be delivered in kind to the following legatees in accordance with the will :—

Eva Cahen, daughter of Camille Cahen, solitaire diamond ring;
Jeanne Cahen, daughter of Camille Cahen, diamond breast pin:
Armand Cahen, son of Camille Cahen, gold Tobias watch:
Leon Cahen, son of Camille Cahen, the other watch.
Yeom Kahn, daughter of Julie Kahn, diamond ring cluster;
Julie Kahn, diamond ear-rings.

Residue.

The balance of the property of the estate of the deceased, as per inventory on file herein, will be delivered jointly to the universal legatees, Camille Cahen and Julie Kahn, in accordance with the will, said property consisting of the following:—

2 pair eyeglasses :
1 pewter box ;
1 silver soup ladle ;
1 doz. large silver spoons ;
15 silver tea spoons ;
1 doz. large silver forks ;
3 silver berry spoons ;
1 doz. silver forks ;
1 butter knife ;
3 salt spoons ;
1 doz. large silver forks with monogram ;
1 doz. silver dessert spoons ;

18 United States—4 per cent., consols of $500.00 each, Nos. 1853 to 1870 inclusive;
1 gold mounting;
2 diamond studs;
1 topaz pin
1 piece of old gold;
1—20 franc gold coin;
7—$20 gold coins;
1—$10 gold coin;
2—$5 gold coins;
13 shares capital stock of Southern Insurance Co., certificate No. 41;
20 United States 4 per cent. consols of $50, each, Nos. 3064 to 3067 inclusive, Nos. 4419 to 4423 inclusive, and 4424 to 4434 inclusive, with coupons attached;
2 bonds of $500 francs each of the Paris to Lyons to the Mediterranean R. R., with coupons attached;
Real estate as described in inventory.

(Signed) MRS. CERF HIRSCH.
WM. ADLER.

17 STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans.

Before me, the undersigned authority, personally came and appeared, Mr. William Adler and Mrs. Cerf Hirsch, testamentary executors of the last will and testament of Mathias Levy, deceased, who being by me duly sworn, depose and says that the above and foregoing account and tableau of distribution is true and correct.

(Signed) MRS. CERF HIRSCH.
WM. ADLER.

Sworn and subscribed before me this third day of August, 1904, at New Orleans, Louisiana.

[SEAL.] (Signed) B. ABRAHAM GOLDBERG,
Not. Pub.

Judgment Homologation Account.

Rendered & Signed Aug. 16, 1904.

Civil District Court for the Parish of Orleans, Division "A."

Succession of MATHIAS LEVY. No. 73654.

Due proof having been made before this court that the final account and tableau of distribution herein filed on the 3rd day of August 1904 has been advertised according to law; that no opposi-

tion has been filed thereto, and that the legal delays for opposing the same have elapsed, and due proof having been also made of the correctness of said account final and tableau of distribution.

It is ordered that the said final account and tableau of distribution be approved and homologated, and the funds distributed accordingly.

Judgement rendered and signed August 16th, 1904.

(Signed) T. C. W. ELLIS, Judge.

18 Rule of Gustave Lemle to Show Cause, etc.

Filed October 14th, 1904.

Civil District Court, Division —.

Succession of MATHIAS LEVY. No. 73654.

On motion of Gustave Lemle, agent and attorney in fact for

1. Widow Henriette Levy, a major,
2. Mrs. *Mrs.* Camille Cahen, a major wife of Felix Cahen,
3. Miss Eva Cahen, a major,
4. Miss Jeanne Cahen, a major,
5. Mr. Felix Cahen, a major, father of the minors, Armand Cahen and Leon Cahen, and who under the laws of France, where said minors reside, as well as under the laws of Louisiana, has the administration of the estate of his minor children, and under said power of administration the right and power to receive and receipt for the legacie*d* left to his said minor children.

All of the above being residents of Potiers, France,

6. Mrs. Julie Kahn, a major, wife of Jules Kahn,
7. Mr. Jules Kahn, a major, father of the minors, Mathias Kahn, Yvon Kahn, Susanne Kahn and Esther Kahn, and who under the laws of France, where said minors reside, as well as under the laws of Louisiana, has the administration of the estate of his minor children, and under the said power of administration the right and power to receive and receipt for the legacies left to his said minor children,

All of the above being residents of Toulon, France,

8. Miss Clementine Cahen, a major and resident of Paris, France,

All of which will more fully and at large appear by the powers of attorney hereto annexed and made part hereof as Exhibits "A," "B," "C," "D" and "E."

19 And on suggesting to the court that they, the above persons, are named as legatees in the last will and testament of Mathias Levy, which will has been ordered registered, probated and executed herein, as will more fully appear by the proceedings on file herein;

And on further suggesting to the court that the final account a-d

tableau of distribution of the executors has been filed and homologated herein, and that said final account and tableau of distribution as homologated gives to the legatees above named the legacies as mentioned in the will, all of which will more fully appear by the said final account and tableau of distribution on file herein;

And on further suggesting to the court that mover, representing said legatees under the powers of attorney hereto annexed, has notified the executors on behalf of his principal*d* that he does accept said succession and legacies and that he does by these presents do so;

It is ordered that William Adler and Mrs. Julia Hirsch, testamentary executors herein, do show cause on the 21st day of October, 1904, why they as executors should not deliver a-d pay over to mover as agent and attorney in fact for the legatees herein above named, the legacies coming to them under the last will a-d testament of Mathias Levy, and fully mentioned and described in the *final account* and tableau of distribution duly homologated herein.

"Service accepted.

(Signed) CHARLES ROSEN,
Att'y for Ex'rs."

Service on Reverse of Petition.

Received Friday Oct. 28, 1904 and on the same day, month a-d year I served a copy of the within rule to distribute on John Brewster State tax collector of the second district of the city of New Orleans.

Returned same day.

(Signed) A. E. AUBRUTIN, D'y Sh'ff.

20 Answer of Executors.

Filed October 19th, 1904.

Civil District Court, Parish of Orleans.

Succession of MATHIAS LEVY. No. 73654.

Now into court, through their undersigned counsel comes William Adler and Mrs. Cerf Hirsch, testamentary executors of the last will and testament of Mathias Levy, deceased, and for answer to the rule herein taken by Gustave Lemle, agent and attorney in fact of Widow Henriette Levy and others, praying delivery to said movers of the legacies to them bequeathed by said decedent say:

That they admit that they have filed their final account and tableau of distribution of the estate of the deceased, and that said final account and tableau of distribution has been approved and homologated by judgment of this honorable court rendered and signed August 16, 1904; and your respondents aver that they are ready and willing to pay out the amount due to movers under the judg-

ment of this court as aforesaid and as set out in said account and tableau of distribution:

But respondents aver that by the provisions of act No. 45 of the General Assembly of this State for the year 1904, approved June 28th, 1904, a tax is levied for the support of the public schools upon inheritance to collaterals and strangers of the deceased; and the president of the school board of this parish, Andrew H. Wilson, has announced to respondents his intention to claim in behalf of said school board the amount of said tax as being due out of the funds in the hands of respondents and the shares coming to said movers;

Respondents aver that said tax is not due to said board for the reason that said act has no application to the property of this succession or the legacies due to said movers in rule; that to give it such application would be to make said act retroactive and divest
21 the vested rights of said movers in rule which would be in violation of the provisions of the constitution of this State, and especially article 166 thereof, and in violation of the Constitution of the United States of America, and especially section 9 of article 1 and the fifth and fourteenth amendments thereof, and in violation of the laws of the State and the land; and it would be a deprivation of property without due process of law and a denial of the equal protection of the laws in violation of the fifth and fourteenth amendments of the Constitution of the United States of America;

Respondents aver that said act is unconstitutional in that it failed to express its object in its title in violation of article 31 of the constitution of the State and especially article 225 thereof;

That said act did not become operative till after its due promulgation, which was after its final account and tableau of distribution had become final and final judgment rendered thereon, and it was therefore in force to- late to effect the shares coming to said movers in rule;

That said school board lost whatever rights it may have had, if any it had, which is denied by its failure to appear and oppose said account and tableau of distribution, and it can not now be heard to assert any claim to any part of this estate or prevent its distribution in accordance with the terms of said final account and tableau of distribution and the judgment of this court rendered thereon which is now final;

Respondents aver that said board should be made a party to these proceedings, and the rights of said board judicially determined by this court;

Wherefore, respondents pray that the board of directors of the school board of this parish, through its president, Andrew H. Wilson, be made a party to these proceedings and be notified thereof, and that after due hearing judgment be rendered upon said rule regarding the respective rights of movers and said school board
22 as law and justice require, for costs and for general relief.

(Signed) CHARLES ROSEN,
Att'y for Executors.

Service accepted and all other rights reserved.

(Signed) ANDREW H. WILSON,
President of the School Board, Parish of Orleans.

Oct. 19, 1904.

Exception of Andrew H. Wilson, President of the School Board.

Filed October 25th, 1904.

Civil District Court, Parish of Orleans, Div. "A."

Succession of MATHIAS LEVY. No. 73654.

Now into this honorable court comes Andrew H. Wilson, president of the board of directors of the public schools for the parish of Orleans, called herein by William Adler and Mrs. Cerf Hirsch, executors of the late Mathias Levy, and made party to the rule taken by Gustave Lemle, agent and attorney in fact of Widow Henriette Levy and others herein for the delivery of certain legacies, &c.;

And this appearer now shows and represents that in his opinion there are taxes due and owing by the executors herein to the State of Louisiana under act No. 45 of the session of the legislature of 1904, and known as inheritance taxes, as will be more fully shown by reference to the inventory filed herein, the will of deceased and said act No. 45 of 1904, but the amount thereof this appearer can
23 not just now set forth and itemize; that said taxes are due the State of Louisiana, and not to the school board of this parish, and are payable to and are collectible by the State tax collector of this parish in whose district said deceased resided at the time or date of her death; that while the said act No. 45 imposes certain duties upon appearer, this appearer believes and so alleges, that it is not his right or duty to stand in judgment herein, or to enforce the collection of inheritance taxes directly, to claim same, or bring suit for same, or to defend suits attacking the legality or constitutionality thereof; but this appearer shows that this suit or the matters at issue herein, should be litigated contradictorily with the State tax collector for the district in which decedent resided when she departed this life;

Wherefore, reserving all other exceptions and right to appear and answer herein, this appearer excepts as above set forth, and prays to be hence dismissed with his costs, and that the State tax collector aforesaid be made party hereto.

(Signed) ANDREW H. WILSON,
President of the Board of Directors of the Public Schools for the Parish of Orleans.

Judgment on exception and service on tax col.

24 Answer of State Tax Collector to Rule Taken by Legatees.

Filed December 2nd, 1904.

Civil District Court, Division "A."

Succession of MATHIAS LEVY. No. 73654.

Now comes John Brewster, tax collector, made defendant in the rule herein taken by the legatees and for answer thereunto denies all and singular the allegations in said rule contained, and further answering pleads that the tax sought to be collected is especially provided for in act 45 of 1904, whereby said tax is now due and collectable.

Wherefore respondents prays that said rule be dismissed at the cost of plaintiffs in rule and that respondent have judgment for ten per cent. attorneys' fees on the aggregate amount of the taxes and penalties herein involved.

(Signed) F. C. ZACHARIE,
Attorney for Tax Collector, Def't.

Answer of Gustave Lemle.

Filed December 9, 1904.

Civil District Court, Division "A."

Succession of MATHIAS LEVY. No. 73654.

Now into this honorable court comes Gustave Lemle, agent and attorney in fact for the legatees named in the original motion on file herein, and for answer to the demand of the school board to be paid inheritance tax under act No. 45 of the General Assembly of this State for the year 1904, says,

That of the property of this estate ten thousand dollars *dollars* is in United States bonds and therefore not subject to taxation
25 by the State, and said taxation is in violation of the Constitution of the United States of America, and the laws made thereunder; that the real property of this estate has been constantly taxed and it and all the other property of this estate has always borne its just and full proportion and amount of taxation, and none of the property of this estate is liable to the tax herein claimed;

Further answering respondent avers that said tax is not due to said board for the reason that said act has no application to the property under this succession or the legacies due to said movers in motion aforesaid; that to give it such application would be to make said

act retroactive and divest the vested rights of the said movers in said rule, which would be in violation of the constitution of this State, and especially article 156 thereof, and in violation of the Constitution of the United States of America, and especially section 9 of article I, and the fifth and fourteenth amendments thereof, and in violation of the laws of the State and of the land; that it would be a deprivation of property without due process of law and a denial of the equal protection of the laws in violation of the fifth and fourteenth amendments of the Constitution of the United States of America;

Further answering respondent avers that said tax *ins* unconstitutional in that it is not equal and uniform, in violation of article 225 of the constitution of this State;

Further answering respondent avers that said act is unconstitutional in that it fails to express its object in its title in violation of article 31 of the constitution of this State; and further is void for uncertainty and vagueness in that it fails to declare and define what is meant by "just proportion of taxes" borne by the property donated or inherited.

Further answering respondent avers that said act did not become operative till after its due promulgation, which was after the
26 final account and tableau of distribution had become final in this succession, and final judgment rendered thereon, and that it was therefore in force too late to affect said movers in said rule;

Further answering respondent avers that said school board lost whatever right it may have had, if any it had, which is denied, by its failure to appear and oppose said account and tableau of distribution, and it can not now be heard to assert any claim to any part of this estate or prevent its distribution in accordance with the terms of said final account and tableau of distribution and the judgment of this court rendered thereon, which is now final;

Wherefore respondent prays that the demand of the school board — be paid inheritance tax on the above styled and numbered succession be rejected, and that its intervention herein be dismissed at its cost, and for all full and general relief.

(Signed) GUSTAVE LEMLE, Att'y.

Judgment on Rule of Gus. Lemle, Agent.

Extract from the Minutes of Division "A."

FRIDAY, January 13, 1905.

Present: Hon. T. C. W. Ellis, judge.

For the written reasons assigned in the written opinion of the court this day delivered and filed.

It is ordered, adjudged and decreed that there be judgment herein in favor of the State tax collector of the second district of New Or-

leans, condemning Wm. Adler and Mrs. Julia Hirsch, testamentary executors of the succession of Mathias Levy to pay the inheritance tax of 10 % upon the value of the property of this succession as shown by the inventory and final account of said executors less the amount of United States bonds and the charitable and religious bequests exempted by law not taxable and that after such payment, that distribution be made among the legatees as provided by the will and as by them prayed for, costs hereof to be paid by the succession.

27 Reasons for Judgment.

Filed January 13th, 1905.

Civil District Court, Div. "A," Ph. Orleans, Louisiana.

Succession of MATHIAS LEVY, Dec'd. No. 73654.

On Rule of Legatees for Possession and Claim of Tax Collector for the Inheritance Tax.

Reasons for Judgment.

This case involves the validity of act 45 of the General Assembly of 1904, known as the inheritance tax and its applicability if valid, to the succession.

Mathias Levy died May 26th, 1904. He was unmarried, and left no ascendants. He left a last will and the legatees thereunder are collaterals or strangers. His succession amounts to largely over $10,000.00 excluding some $10,000.00 of United States bonds which are not taxable. It does not appear that the ordinary taxes due on the property of the succession have been paid. The final account homologated by judgment, makes no mention of any taxes having been paid. Considerable sums and specific things go to particular legatees and the residue to two universal legatees. The will was probated May 30, 1904. The inventory was taken June 3, and a supplemental inventory August 3, 1904. The final account of the executors was filed August 3 and homologated without opposition, August 15, 1904.

There had been when this rule was tried no judgment recognizing the instituted heirs and ordering them put in possession, and the executors have not been discharged, but are still acting, since the trial of the rule herein, the universal legatees were ordered put in possession on Jan'y 3rd, 1905, but the executors hold things giving to the particular legatees and each sufficient to pay the inheritance if decided to be due by the succession.

28 On October 14th, 1904, the counsel for the legatees filed the rule now under consideration, praying for the delivery to them

of their respective legacies. The executors made answer recognizing their right to said legacies, but alleging that the school board had made demand on them, for the payment of the inheritance tax levied by act 45 of 1904. They propound the unconstitutionality of said act, in that its title failed to set forth its object, and its applicability, in any event to this succession, because the act 45 became a law, after the death of Mr. Levy and argues that said legatees were invested with full title to their legacies, at the instant of his death, on the rule *le mort saissit les vifs* a-d that to compel them to submit to the payment of the tax levied by said act 45 of 1904, which was not enacted, until after said death, would be to give it retroactive operation, the effect of which would impair their vested rights to receive said entire inheritance, without any deduction for said tax. The legatees join the executors in these defences against said tax, while the tax collector makes answer claiming said tax as a legal charge against the succession.

The said act was approved June 28th, 1904 and was promulgated July 9, 1904, a-d became operative here July 30, 1904.

It is entitled "An act to carry into effect article- 235 and 236 of the constitution of 1898 relative to inheritance taxes." It follows literally the terms of said articles and relates exclusively to inheritance taxes, and this, in my judgment relieves it from the charge based on the alleged insufficiency of the title.

It levies a tax of ten per cent. on all inheritances going to strangers or collaterals, excepting bequests for charitable or educational purposes. It applies the tax, with equality and uniformity to all successions exceeding $50,000.00 in value, "not finally closed a-d administered upon," which meets the objection based on its want of uniformity and equality. See Walston *vs.* Nevin 128 U. S.
29 582 citing Wurts *vs.* Boagland 114 U. S. 606 and other cases.

As to the argument, that the act can not be applied to this succession, without impairing the rights, that were vested in said legatees by the death of Mr. Levy, and at the instant of his death, careful study and examination of the authorities have led me to the conclusion that it is not well grounded. It may be conceded for argument sake that their rights to Mr. Levy's property or assets, as devised to them by his will, were vested in them at the moment of his death, and that, at that time, there was no law providing for an inheritance tax. But there was, in the constitution of 1898, a provision that the General Assembly could levy an inheritance tax, on successions such as Mr. Levy left, and there was and there could be in their favor, no vested right, quarantining them against the power of the State legislature to impose and collect the tax, permitted by the State constitution, if it should so legislate, before said succession should be "finally closed and administered upon."

It is well settled, that no one can have a vested right in property exempting it from the general police power, or the sovereign right in *iminent* domain, or the power of taxation for purposes of public revenue. Nor can any power have a vested right, that the public

policy of the State, as existing at the time of the acquisition of such right, in property, will remain always the same. Nor is it of any moment, that a law may retroact, provided it does not impair a vested right.

See Black's Constitutional Prohibition 186 p. 238 p. 271, and section 216 p. 274 128 U. S. 578, 582. Davidson *vs.* N. O. 96 U. S. 97 104, 23 A. 79 Fulham *vs.* Mahan.

If Mr. Levy's death and testament vested rights in said legatees, those rights were subject to the administration and settlement of his estate, and remained involved in his succession which up to this day is not finally closed, but, as to the things and sums devised to the particular legatees, and as to the funds to meet the inheritance tax, if so ordered, is still in the hands of the executors who have not been discharged. See Carter Congreve *et al. vs.* City 33 A. 816, citing State *vs.* Brown 32 A. 1020 and Stewart case 28 A. 180 and Rec. 872, 873.

But it must be noticed that the rule *le mort saissit levif* while applicable to heirs and instituted heirs, has no application to particular legatees, (Rec. 940, 942). As to them the basis of the argument therefore wholly fails.

As already stated, the act 45 of 1904 was operative here July 3, 1904. My conclusion, therefore, is that it was not and is not retroactove, as to said succession, then under administration and not yet closed; that its provisions do not effect the vested rights of any person therein interested, in the sence and meaning of the Constitution; that it is applicable to this succession and that the inheritance tax, levied by it, must be paid, before delivery, in full to the instituted heirs, or to the particular legatees.

The act No. 45 of 1904 exempts inheritances and donations from this tax, if "prior thereto," the property donated or inherited shall have borne its just proportion of taxes" The object seems to be to reach property, that has escaped taxation, and compel it to contribute. It does not impose double taxation.

As already stated, the account of the executors shows no taxes paid. The taxes due for 1904 were prior to the probate will and prior to the death of Mr. Levy, because the death and probate occurred (Corrected. See reasson for judgment on rule for new trial filed March 2, '05. Sig. T. C. W. Ellis, judge) after the assessment for the taxes for the year 1904. If assessed, the taxes were payable when the rolls were complete and on file. If not assessed or if assessed and the taxes of 1904 had not been paid prior "to the death, or, at latest prior to the probate of the will, then, the property has escaped the ordinary taxation or, as the law reads, "has not borne its just proportion of taxes," and it must be subjected to the inheritance tax.

Payment of the ordinary taxes, after the right to the inheritance tax has accrued would not avail, because the act requires prior payment.

31 Lastly it is urged that the school board or tax collector did not oppose the final account of the executors, to claim this inheritance tax, and that the right to claim it, now, is shut off by the judgment of homologation. With the property of this enclosed succession still in the hands of the executors, we officers of the Constitution under its orders, the position hardly seems tenable. The judgment of homologation would not, under such conditions, prevent even an ordinary creditor from suing on his claim. Much less can it defeat the right of the State to collect the tax which it has appropriated for the benefit of the public schools, from this succession, which is subject thereto.

Judgment therefore will be rendered in favor of the tax collector, ordering the executors to pay the inheritance tax of ten per cent. upon the value of the property of the succession of Mathias Levy, deceased, as shown by the inventory and final account of said executors, less the amount of U. S. bonds not taxable, and after such payment, it is ordered that distribution be made among the legatees, as provided by the will and as prayed for by them, costs hereof to be paid by the succession (& U. S. bonds as asset of succ'n ordered not to be deducted this corrected by rule for new trial M'ch 2, '05, T. C. W. Ellis judge)

N. O. Jan'y 12, 1905.

(Signed) T. C. W. ELLIS, Judge.

Motion for New Trial.

Filed January 17th, 1905.

Civil District Court, Division "A."

Succession of MATHIAS LEVY. No. 73654.

On motion of Gustave Lemle, and Charles Rosen, attorneys respectively for legatees and executors, and on suggesting to the court that all taxes have been paid on the real estate inventoried, and that the heirs and executors should be permitted to introduce evidence to show this.

32 And on further suggesting t- the court that the judgment rendered herein condemning the legatees to pay ten per cent. on all amounts inherited by them, except the United States bonds, is contrary to the law and the evidence.

It is ordered by the court that the school board for the parish of Orleans and John Brewster, tax collector, do show cause why a new trial should not be granted the legatees herein.

—— ——, Judge.

City Tax Research, Dated *Dated* January 23rd, 1905.

Filed February 24th, 1905.

Melon. Lemle.

City Taxes.

Fee, $1.00.

Comptroller's Office, City of New Orleans, La.

No. 1001. NEW ORLEANS, Jan'y 23, 1905.

The research made this day on real estate in square No. 29 bounded by Conti Decatur Chartres Bienville lot 13–21 x 532 is as follows:

Year.	No. bill.	Name.		Tax.
1904	1890	Mathias Levy.....	Due	2960
1903	2208	"	Paid Sept. 28/03...	
1902	2161	"	" Aug. 8/02.....	
1901	2143	"	" Aug. 1/01.....	
1900	2101	"	Paid	
1899	2063	"	Paid	
1898	2098	"	Paid	
1897	2037	"	Paid	
1896	1276	"	"	
1895	1701	"	Paid	
1894	1702	"	"	
1893	1960	"	"	
1892	1968	"	"	
1891	1704	"	"	
1890	2179	"	"	
1889	2205	"	"	
1888	2217	"	"	
1887	2246	"	"	
1886	1885	"	"	
1885	2193	"	"	
1884	2059	"	"	
1883	2060	"	"	
1882	1771	"	"	
1881	2501	"	"	
1880	2108	"	"	
1878	1678	"	"	
1877	1761	"	"	
1876	2195	"	"	
1875	670	C. Tiblier	"	

Year.	No. bill.	Name.		Tax.
1874	637	C. Tiblier	Paid	
1873	1152	"	"	
1872	534	"	"	
1871	39285	"	"	
1870	34402	"	"	

The foregoing is a true and correct statement, as taken from the tax records on file in this office.

CHAS. R. KENNEDY,
Comptroller,
Per E. O. RAMBAUD.

[Endorsed:] 73654 C. D. C. Filed Feb'y 24/1905. (Signed) P. A. Ducoing, d'y clerk.

33 State Tax Research, Dated January 23rd, 1905.

Filed February 24th, 1905.

Paid Fee, One Dollar. G. Lemle.

State Tax Collector 2d Dist.

Office, Cor. St. Anthony Alley and Chartres, Civil District Court Building.

Certificate of State Taxes.

No. 5610. NEW ORLEANS, Jan'y 23, 1905.

The research made this day on real estate in square No. 6/29 bounded by Decatur Conti Bienville Charters lot 13. 21 x 53 is as follows:

Year.	Name.	Assessment.	Tax.	Remarks.
1904	Mathias Levy.....	1800	.....	Due
1903	"	.....	.....	Paid Oct. 16 1903
1902	"	.....	.....	" " 28 1902
1901	"	.....	.....	" Sept. 17 1901
1900	"	.....	.....	" Oct. 5 1900
1899	"	.....	.....	" " 3 '99

Year.	Name.	Assessment.	Tax.	Remarks.
1898	Mathias Levy			Paid Nov. 10 '98
1897	"			" Dec. 13 '97
1896	"			" Aug. 25 '96
1895	"			" Oct. 8 '95
1894	"			" Dec. 18 '94
1893	"			" July 24 '93
1892	"			" Oct. 27 '92
1891	"			" Sept. 12 '91
1890	"			" Dec. 31 '91
1889	"			" July 28 '90
1888	"			" Sept. 29 '88
1887	"			" Aug. 23 '87
1886	"			" Dec. 20 '86
1885	"			" Oct. 8 '85
1884	"			" Oct. 20 '84
1883	"			" Dec. 26 '83
1882	"			" Aug. 15 '82
1881	"			" Oct. 24 '81
1880	"			Paid
1878	"			
1877	"			
1876	"			
1875	Tiblier			
1874	"			Not on D. roll
1873	"			
1872	"			
1871	"			
1870	"			
1869	"			

The foregoing is a true and correct statement, as taken from the tax records on file in this office.

[SEAL.] (Signed) A. LEGEAE,
D'y State Tax Collector.

[Endorsed:] 73654 C. D. C. Filed Feb'y 24th, 1905. (Signed) P. A. Ducoing, d'y cl'k.

34 Judgment on Rule for New Trial.

Civil District Court for the Parish of Orleans.

Succession of MATHIAS LEVY, Deceased. No. 73654.

For the reasons assigned, in the written opinions of the court herein delivered on January 13th., 1905 and this day.

It is ordered, adjudged and decreed that there be judgment of January 13th., 1905, — be amended and recast as follows ;

It is ordered, adjudged and decreed that there be judgment in favor of the State tax collector of the 2nd , district of New Orleans, condemning the succession of Mathias Levy, through its testamentary executors, William Adler and Mrs. Julia Hirsch to pay the inheritance tax of ten per cent. upon the amount of all the property, bonds, securities, moneys notes, jewelry, bills etc. belonging to this succession, as shown by the inventory and account excepting the sums — eighteen hundred dollars, value of the real estate, and also the amounts of the religious and charitable bequests; costs herein to be paid by the succession.

It is further ordered and decreed, that the demands of the State tax collector, for 10 % attorneys' fees, be dismissed.

It is further ordered and decreed that thereafter, distribution be made among the legatees, as provided by the will, and as by them prayed for.

And as hereinabove amended, it is ordered and decreed that the judgment of January 13th., 1905 remain undisturbed and the motion for a new trial be dismissed.

Judgement read and rendered in open court March 2nd., 1905.

Judgement signed in open court March 9th., 1905.

(Signed) T. C. W. ELLIS, Judge.

35 Reasons for Judgment.

Filed March 2nd, 1905.

C. D. Court, Div. "A," P'h Orleans, La.

Succession of MATHIAS LEVY, Deceased. No. 75654.

On the New Motion for New Trial.

Reasons for Judgment.

1st. The estate of the deceased Mathias Levy, giving under his will to certain legatees named, consisted for the great part of stocks, bonds, money, notes, securities, jewelry and personal effects. The

entire estate aggregates $64,676.05. (See the two inventories on file.) Of this aggregate $1,800 was real estate.

None of the property, except the real estate, has ever been assessed. The real estate was regularly assessed and all taxes upon it had been paid, except the tax of 1904. For 1904, the assessment of said real estate id $1800. As the State and city taxes due on the real estate, can be collected, it can not be said that the real estate has not "borne its just proportion of taxes, prior to the inheritance." Besides, being assessed for general taxation, *i. e.* support of State and city government, for 1904, and all prior taxes having been paid, before Mr. Levy's death and his death occurrring May 26th., 1904, after the assessment, heretofore, at lea-t, the city tax bills had been made out before the taxes due to the State and to the city became delinquent, it seems to me, that, *quoad* the real estate, the inheritance tax can not be enforced. By consent, the researches from the offices of the tax departments of the State and city have been put in the record, for consideration, on the motion for new trial. They were not offered, or before me, when I first decided this case and I was lead into error, as to the real estate.

36 As to the residue of the estate property, stocks bonds, notes, bills, securities, money, jewelry and personal effects, there has never been an assessment for taxation, nor a tax paid and the inheritance tax of 10 % must be paid upon all of said personal property, money, bonds, etc., giving to the legatees, they all being collaterals & strangers; none of them heirs in the ascending or descending line.

2nd. As the original trial, the exemption of the amount of the estate invested in U. S. bonds was claimed and no point was raised and I fell into error in decreeing their exemption from this inheritance tax. On the rule for new trial the att'y of the tax collector, Col. Zachary has argued the question most ably, and I find that the liability of an inheritance, consisting of U. S. bonds (though not of themselves not taxable) to the inheritance tax, has been settled. U. S. *vs.* Perkins 163 U. S. 625. Plummer *vs.* Cole.

As the record is now complete, I will correct, on the motion for a new trial this error in the judgment as rendered without reopening the case for a new trial.

3rd. Only one other question remains, that is, whether the legatees to whom the various legacies go, are liable in addition to the ten per cent. inheritance tax, for the fees of the attorney of the tax collector, under section 57 of the revenue act of 1898.

The services rendered by F. C. Zacharie, in this case, in argument and by brief, have been so valuable and of such benefit, on all the issues involved, that I regret the necessity which compels the rejection of this claim.

The tax collector claims in his answer to the rule herein, ten per cent., as the fees and compensation of the attorney appointed to assist him, same to be paid by the legatees. This claim is made under section 57 p. 374 of act 170 of 1898, the general revenue law. That

act relates to the annual levy and collection of taxes, for the support of the State government *But* sec. 67, the attorney of the tax
37 collector, is charged with the duty of aiding the tax collector, "the collection of all taxes" and to represent "him" in all suits for the reduction of assessments; and the provision is then made, that, "upon all taxes and penalties collected through the assistance of said attorney the delinquent, owning the tax shall pay a commission to said attorney of ten per cent. &c."

The inheritance tax was not provided for, until act 45 of 1904 "became a law" (Acts 1904 p. 102). It is a tax, not borne on the assessment rolls, but the payment is to — made the rax collector (sec. 3 of said act 45). The 4th., section devolves the duty upon the president of the school board in New Orleans and the parish superintendents elsewhere of seeing "that the full amount of the inheritance tax be duly collected," and "it shall be the duty of the district att'ys for the various parishes, throughout the State, when called on, by the parish superintendents or the president of the school board of the parish of Orleans, to take proceedings to enforce the provisions of this act."

It seems to me, that I have no power to decree the 10 % claimed for the att'y of the tax collector, because the special act does not so provide. As this fee is in the nature of a penalty charg-able to the "delinquent," the construction ought to be strict. Unless the fee is provided by the special act No. 45 of 1904, I hardly see how I could award it, under the general revenue act of 1898.

There has been no delinquency on the part of the legatees to whom the legacies go. They take, under the law, by the depositions of the will, and upon the amount of the legacies going to them the only law, on the subject, levies a charge of ten per cent., as an inheritance tax, and nothing more.

The judgment heretofore rendered will be corrected, so as to exempt the amount of the real estate, going to the universal legatee, from the inheritance tax, the amount, *i. e.* the value of said real estate being &1800., and the clause of the judgment, exempting from the said tax, the amount of the United States bonds
38 inventoried is annulled a-d stricken from the judgment.

In all other respects the judgment will remain as rendered.

On the demand of the tax collector for 10 % attorneys' fees there will be judgment for the succession and the legatees dismissing said demand.

The judgment will be amended a-d thereupon the motion for a new trial will be dismissed.

N. O. March 1st, 1905.

(Signed) T. C. W. ELLIS, Judge.

Motion of Appeal.

Filed March 10th, 1905.

Civil District Court, Division —.

Succession of MATHIAS LEVY. No. 73654.

On motion of Gustave Lemle, attorney for Mrs. Widow Henriette Levy, Mrs. Camille Cahen, wife of Felix Cahen and of said Felix Cahen her husband, Miss Eva Cahen, all majors, and Armand Cahen and Leon Cahen children of said Mrs. Camille Cahen and Felix Cahen and both minors all residents of Poitieres, France, and of Mrs. Julie Kahn, wife of Jules Kahn and of said Jules Kahn her husband both majors, and the minors Mathias Kahn, Yvon Kahn, Susanne Kahn and Esther Kahn the minor children of said Mrs. Julie Kahn and Jules Kahn, all of whom are residents of Toulon, France, and of Miss Clementine Cahen, a major, residing in Parsi France and of Charles Rosen attorney for William Adler and Mrs. Widow Julia Hirsch, testamentary executors of the succession of Mathias Levy, and on suggesting to the court that there is error to
39 the prejudice of movers in the judgments herein rendered on the 13th. Jan'y 1905 and 2 day of March 1905 and signed on the 9th. day of March 1905, and that movers desire to appeal suspensively therefrom,

It is ordered that a suspensive appeal be granted movers herein returnable to the hon. the supreme court of the State of Louisiana, on the 3rd. Monday of March 1905, upon movers furnishing bond with good and solvent security, in the sum of ($1000.00) one thousand dollars and conditioned as the law directs.

(Signed) T. C. W. ELLIS, Judge.

Appeal Bond.

Filed March 14th, 1905.

Know all men by these presents, that we Mrs. Widow Henriette Levy, Mrs. Camille Cahen, wife of Felix Cahen and Felix Cahen to authorize her; Miss Eva Cahen, Miss Jeanne Cahen Armand Cahen, Leon Cahen and Miss Clementine Cahen; Miss Julia Kahn, wife of Jules Kahn and Jules Kahn to authorize her; Mathias Kahn, Yeom Kahn, Miss Susanne Kahn, Miss Esther Kahn and William Adler and Mrs. Widow Julia Hirsch, testamentary executors of the succession of Mathias Levy, as principals and Gustave Lemle as surety are held and firmly bound unto Thomas Connell clerk of the civil district court, for the parish of Orleans, his successors, executors, administrators and assigns, in the sum of one thousand dollars, for the

payment whereof we bind ourselves, our heirs, executors and administrators, firmly by these presents

Sealed with our seal, and dated in the city of New Orleans, on this tenth day of March in the year of our Lord one thousand nine hundred a-d five.

Whereas, the above bounden Mrs. Henriette Levy, Mrs. Camille Cahen, Miss Eva Cahen, Miss Cahen, Armand Cahen, Leon Cahen, Miss Clementine Cahen, Mrs. Julie Kahn, Mathias Kahn,
40 Yeom Kahn, Miss Susanne Kahn, Miss Esther Kahn and Wm. Adler and Mrs. Julie Hirsch, executors have this day filed a motion for a suspensive appeal from a final judgment rendered against them in the suit of the succession of Mathias Levy No. 73654 of the civil district court for the parish of Orleans, on the 13th January 1905 a-d March 2nd, 1905 a-d signed on the 9th. day of March 1905.

Now the conditions of the above obligation is such, that the above bounden Mrs. H. Levy, Mrs. Cahen, Miss Eva Cahen, Armand Cahen, Leon Cahen Miss Clementine Cahen, Mrs. Kahn, Mathias Kahn, Yeom Kahn, Miss Susanne Kahn, Miss Esther Kahen and Wm. Adler and Mrs. Julia Hirsch, executors shall prosicute their said appeal, and shall satisfy whatever judgment may be rendered against them or that the same shall be satisfied by the proceeds of their estate real or personal, if they be cast in the appeal; otherwise that the said — shall be liable in their stead.

Signed, sealed and delivered in the presence of

(Signed) WILLIAM ADLER AND
MRS. CERF HIRSCH,
Testam-tary Executors,
By CHARLES ROSEN, Att'y.
MRS. HENRIETTE LEVY,
MISS CAMILLE CAHEN,
FELIX CAHEN,
MISS EVA CAHEN,
MISS JEANNE CAHEN,
ARMAND CAHEN,
LEON CAHEN,
MRS. CLEMENTINE CAHEN,
MRS. JULIE KAHN,
JULES KAHN,
MATHIAS KAHN,
LEON KAHN,
SUSANNE KAHN,
41 ESTHER KAHN,
All Above by GUSTAVE LEMLE, Att'y.
GUSTAVE LEMLE. [SEAL.]

42 Agreement Between Counsel.

Filed March 20th, 1905.

Civil District Court, Division "A."

Succession of MATHIAS LEVY. No. 73654.

It is agreed between counsel for appellants and appellees in this cause that the following documents shall be copied in and constitute the record of the transcript of appeal in this case, viz:

1st. The petition to probate will and the probate thereof.
2nd. The will.
3rd. The inventory and supplemental inventory.
4th. The account and judgment homologating same.
5th. The rule of Gustave Lemle, agent and attorney in fact of Mrs. Henriette Levy, *et als.*, to show cause (omitting the powers of attorney).
6th. Answer of the executors to the rule.
7th. Exception of Andrew Wilson, Esq., pres't of the school board.
8th. ——.
9th. Answer of State tax collector.
10th. Answer of Gustave Lemle, agent of Mrs. Henriette Levy, *et als.*
11th. Judgment of rule of Gustave Lemle, agent, and reasons for judgment.
12. Motion for new trial.
13th. Tax receipts city and State (the original to be put in transcript in lieu of copies).
14th. Judgment on rule for new trial and reasons for judgment.
15th. Motion a-d order of appeal.
16th. Bond of appeal.
The right being reserved to counsel for either side to bring up any other documents they may desire.

43 (Signed) GUSTAVE LEMLE,
Att'y for Legatees.
CHARLES ROSEN,
Att'y for Executors.
F. C. ZACHARIE,
Att'y for Tax Col., Par. Orleans.

44 Certificate.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

I William Murphy, deputy clerk of the civil district court for the parish of Orleans, do hereby certify that the foregoing forty two (42)

pages do contain a true, correct and complete transcript of all the proceedings had, documents filed and evidence adduced upon the trial of the cause entitled Succession of Mathias Levy, instituted in this court and now in the records thereof under the No. 73654 of the docket thereof div'n A, the Honorable T. C. W. Ellis, judge, required to be included herein, as per agreement filed March 20, 1905 copied in said transcript on p. 42.

In testimony whereof, I have hereunto set my hand and affixed the impress of the seal of said court, at the city of New Orleans on this third day of April in the year of our Lord one thousand nine hundred and five and in the one hundred and twenty ninth year of the Independence of the United States of America.

W. B. MURPHY, D'y Clerk.

45 Proceedings Had in the Supreme Court of Louisiana.

Motion and Order for Time to File Transcript.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

Succession of MATHIAS LEVY. No. 73654.

William B. Murphy, deputy clerk of the civil district court for the parish of Orleans, being duly sworn, deposes and says that the transcript of appeal in the above entitled and numbered cause, returnable to the supreme court of the State of Louisiana on the third Monday of March 1905, has not been completed, for the reason that there has not been sufficient time to complete same and that an additional delay until the first Monday of April, 1905 from this date is necessary to enable him to complete the same.

(Signed) W. B. MURPHY,
Deputy Clerk.

Sworn to and subscribed before me this 20th day of March A. D. 1905.

[SEAL.] (Signed) T. CONNELL,
Clerk of the Civil District Court for the Parish of Orleans.

Supreme Court of Louisiana.

Succession of MATHIAS LEVY. No. 15610.

On motion of Gustave Lemle, Esq., of counsel for heirs and appellant, and on filing the affidavit of the clerk of the lower court, showing that he will require further time to complete the transcript of appeal in this case; it is ordered by the court that the return day for filing said transcript in this court be extended to the 3rd day of April, A. D. 1905.

46 Entered and filed March 27 1905.

(Signed) T. McC. HYMAN, Clerk.

(Endorsed:) No. 15,610. Supreme court of Louisiana. Succession of Mathias Levy. Appeal from the civil district court for the parish of Orleans. Affidavit for extension of return-day. Filed March 20, 1905. (Signed) Paul E. Mortimer, deputy clerk.

Answer of Appeal.

Succession of MATHIAS LEVY. No. 15610.

To the honorable chief justice and the associate justices of the supreme court of Louisiana:

Now comes the defendant and appellees herein, The State Tax Collector, and for answer to plaintiff's appeal, prays for an amendment of the judgment herein so as to embrace and include in the judgment and decree the ten per cent. attorney's fees for the attorney for the tax collector on the aggregate amount of taxes and penalties involved in this cause under the second paragraph of act 170 of 1898, which were through error excluded from the judgment of the court *a qua*, and the said court refused a new trial which was applied for on that account.

Wherefore, the premises considered, defendant and appellee prays that the judgment and decree rendered in the lower court should be amended by your honors so as to embrace the ten per cent. attorney's fees as herein above set forth, and for all equitable relief and all necessary orders in the premises.

(Signed) F. C. ZACHARIE,
Attorney for State Tax Collector.

(Endorsed:) No. 15,610. Supreme court of Louisiana. Answer of defendant and appellee. Succession of Mathias Levy. Filed April 10, 1905. (Signed) Paul E. Mortimer, dep. clerk.

47 Motion and Order to Re-assign.

(Extract from Minutes.)

NEW ORLEANS, MONDAY, April 24th, 1905.

The court was duly opened, pursuant to adjournment.

Present: Their honor- Joseph A. Breaux, chief justice, Francis T. Nicholl, Frank A. Monroe, Oliver O. Provosty, Alfred D. Land, associate justices.

Succession of MATHIAS LEVY. No. 15610.

On motion of F. C. Zacharie, attorney for The Tax Collector, defendant and appellee herein, and on showing that this cause is fixed for trial and argument on Friday, April 28th and the case of succession of Samuel Arthur Kohn, No. 15,629, is fixed for Saturday

April 29th, and both these cases embrace and involve the inheritance tax law, (No. 45 of 1904), it is ordered by the court that the succession of Levy be reassigned and set for argument on Saturday, 29th April, 1905, the attorney for appellant joining in this motion.

Called, Argued, and Submitted.

(Extract from Minutes.)

NEW ORLEANS, SATURDAY, April 29, 1905.

The court was duly opened, pursuant to adjournment.

Present: Their honors Joseph A. Breaux, chief justice, Francis T. Nicholls, Frank A. Monroe, Olivier O. Provosty, Alfred D. Ladd, associate justices.

Succession of SAMUEL ARTHUR KOHN. No. 15629.

Succession of MATHIAS LEVY. No. 15610.

These two cases, pursuant to the order herein entered on the 24th day of April instant, came on this day to be heard and were argued by counsel:—Mr. Francis Charles Zacharie, for The Tax Collector, defendant and appellee; Mr. Charles Ferdinand Claiborne for the succession of Kohn, plaintiff, appellant; Mr Gustave Lemle,
48 for the universal and particular legatees in the succession of Levy, also defendants and appellants. The court then took the causes under advisement upon the briefs for the respective parties in interest and the papers now on file.

Judgment of the Court.

(Extract from Minutes.)

NEW ORLEANS, MONDAY, May 8, 1905.

The court was duly opened, pursuant to adjournment.

Present: Their honors Joseph A. Breaux, chief justice, Francis T. Nicholls, Frank A. Monroe, Olivier O. Provosty, Alfred D. Land, associate justices.

His honor the chief justice pronounced the opinion and judgment of the court in the following case:—

Succession of MATHIAS LEVY. No. 15610.

Appeal from the Civil District Court, Parish of Orleans.

Our learned brother of the district court condemned the legatees to pay the inheritance tax upon the amount of all property, bonds, securities, moneys, notes, jewelry, bills, etc, belonging to the successions as showing by the inventory and account, except the sum of

$1800 value of real estate, also the amount of religious and charitable bequests.

There should also be excepted from the payment of this tax the debts of the succession, amounting to $11,998.10.

It is therefore, ordered, adjudged and decreed that the judgment appealed from be accordingly amended, and as amended, it is affirmed at the costs of appellees.

Opinion of the Court.

49 (Breaux, C. J.)

Succession of MATHIAS LEVY. No. 15610.

Appeal from the Civil District Court, Parish of Orleans.

The legatees of the late Mathias Levy oppose the tax collector's demand for the inheritance tax.

The testator Mathias Levy died in the city of New Orleans on the 26th day of May, of the year 1904, leaving a large estate. This property consisted of cash and property reduced to cash, United States bonds, real estate, stocks in a foreign company, silverware, jewelry, gold coins. He was unmarried and left no ascendants.

His will was probated and execution thereof ordered on the 30 day of May, 1904. He bequeathed part of his property to special legatees and the remainder to universal legatees.

The account of the executors was approved by judgment on August 16th, 1904. Thereafter, the special and universal legatees obtained a rule on the executors to show cause why they should not pay them their legacies.

The executors answered that in view of the statute before cited authorizing the collection of an inheritance tax, the school board should be made a party and such action taken, regarding the right of parties, viz: the legatees and the tax collector demanding the inheritance tax as law and justice required. The president of the school board appeared for the board and suggested that the board had no standing in court, and asked that the tax collector for
50 the district in which the deceased resided when he died should be made a party.

This exception remained without action and subsequently the tax collector was made a party. Through his legal adviser and counsel, the tax collector appeared in court and averred that the tax was due under the said statute: further,

"That the rule should be dismissed at the cost of movers and that judgment should be rendered against movers for ten per cent. atttorney's fees on the aggregate amount of the taxes and penalties involved."

The legatees of Mathias Levy seek to meet this demand of the tax

collector by averring that the title of the inheritance tax law" is defective and illegal, because it fails "to express its object in its title and thereby falls short of the requirements of the article 31 of the constitution of Louisiana.

The articles of the constitution 235 and 236 set forth that "The legislature shall have power to levy solely for the support of the public schools, a tax upon all inheritances, legacies and donations" and provides some of the details to be followed in levying this tax.

The title of the act attacked, specially, refers to these articles, and declares that it is to carry them into effect and to provide for the collection of an inheritance tax. The title embraces the purpose of the act. It sufficiently suggests the object to every man of average understanding.

State *vs.* Hackett, 5 Ann. 92.

In our view the statute is not unconstitutional for insufficiency or illegality of the title.

The second ground urged by the legatees of Mathias Levy in opposition to the claim of the tax collector for the inheritance tax is:

"That the act is unconstitutional for the reason that it is retroactive and divests vested rights in violation of article 166 of the constitution of Louisiana, and the fifth and fourteenth amendments of the Constitution of the United States."

51 We have heretofore mentioned the date of the death of Mathias Levy. The statute in question was approved June 28th, 1904, and was promulgated July 9th, 1904, and became operative in New Orleans, July 30th, 1904.

The succession of Mathias Levy had not been finally closed at the date that the law became operative. The statute embraced all successions, those opened and not settled, as well as to be opened.

The attack is levied against the statute on the ground that it is retroactive. There was a possible demand for an inheritance tax created by the articles of the constitution before cited. The legislature could avail itself of the delegated power to enact an inheritance tax law. From the date of the organic law every property owner held this property subject to a statute enacted to render the delegated power relating to the inheritance tax operative, and from that date, at least, the law is not absolutely retroactive.

The power to tax is without limit in its force and in the extent of its search. Generally, it can only be restrained by the good sense of the citizen who brings his good influence to bear toward moderating legislation upon the subject and to prevent erroneous and vexatious taxation.

Cooley Constitutional Limitations, 7th ed. p. 678.

Furthermore, we have said the legatees acquired no vested right to the property bequeathed, which could enable them to successfully defend their inheritance against the demand of the State for the inheritance tax. It was property within the limits of the State which

the State could tax for purpose mentioned, until it had passed out of the succession of the testator.

The right was not absolutely vested in the heirs free from all possible taxation and in consequence the alleged retroactivety of the law, even if retroactive, could be of no avail as a defense against the tax.

Black Constitutional Prohibition, 186, p. 238, p. 271.
Walston *vs.* Nevin, 128 U. S. 582.
52 Davidson *vs.* New Orleans, 96 U. S. 97–104.
Frellsen *vs.* Mahan, 21 A. 79.

These legatees have unquestionably a right to the property to the extent of their respective legacies—an undisputed right subject to no demand, except that of the State in its sovereign capacity for the maintenance of government.

The inequality and ununiformity of the tax presents a serious question, for in a republican form of government, all stand or should stand equal before the law and entitled to its equal protection, and any exaction which savors of ununiformity and inequality at once awakens attention.

We have seen that the tax falls alike on all successions under administration. It operates on all persons similarly concerned in regard to the tax since that date and to all successions similarly situated. They are all entitled fo the same protection and are liable for a similar inheritance tax.

The Supreme Court of the United States passed upon this point. We insert the following excerpt from a lengthy and interesting decision upon the subject: "From these principles it is deduced that the States may tax the privilege, discriminate between relatives and between these and strangers and grant exemptions; and are not precluded from this power by the provisions of the respective State constitutions requiring uniformity and equality of taxation.

At first blush it does appear that it is scarcely just to tax all successions opened since said time and not yet closed, and not tax those that have been opened and closed in that time.

The vigilant frequently meet with a larger degree of protection than they deserve. We are aware that this is not an answer to the complaint of the legatees here who cannot be charged with dilatoriness. But sufficient answer may be found in the fact that
53 it would be utterly impracticable to tax successions that have been closed, for the very good reason that there is no succession remaining; the inheritance has then become a *fait accompli*, and it is too late to tax an inheritance which has passed into the possession and ownership of the heir; where the executor has been discharged and all have received their quietus from any claim of the succession.

The taxing power cannot reinstate a succession for the purpose of taxation.

Here the succession of Levy had not been closed. It is in the

hands of the executors who have not been discharged. This court held, as set forth in the syllabus that, the assessment and judgment for taxes against a succession as such, are legal when the heirs have not obtained a decree of court recognizing and putting them in possession.

Carter, Congreve *et al. vs.* City of New Orleans, 33 Ann. 816;
State *vs.* Brown, 32 Ann. 1020;
City of New Orleans *vs.* Estate Stewart, 28 Ann. 180;
Civil Code, 872, 873.

The succession was not closed at the date that the act became operative. On the day of the homologation, that is, on August 16th, 1904, the taxes were due.

It was still in time to claim these taxes before the funds had been distributed, the legatees placed in possession and the executor discharged. The legatees had not been paid. It was in time for the State, through its tax collector, to appear in court and demand payment of an amount due by each legatee. To that extent the account was not final. The tax collector's petition for the tax was filed prior to payment to the legatees, who have not yet been paid.

A succession is an ideal, a juridical person, independent from those having an interest therein.

It is true regarding this "ideal," this juridical person, that: *Le mort saisie le vif*—yet the heir must be put in possession and until he goes into possession regularly, the succession, as relates to creditors, is considered opened and unsettled.

54

In this case the legatees could not go into possession without an order. They have to be placed in possession by the succession representative.

The tax is not a tax "upon the property itself, but upon its transmission by will or by descent." 178, U. S. 131.

It is a tax upon the right to dispose of property. As long as the succession, the "ideal," or juridical person remains in the hands of executors, the legislative power may classify it and subject it to a tax.

In the Plummer case, cited *infra*, the right of descent was decreed subject to the inheritance tax on United States bonds, although the bond itself is exempt from taxation.

It was held to form a class of itself which did not operate unequally. And we infer that the same reasoning sustains the view that the tax is not retroactive which is imposed on the juridical person: the succession.

The jurisprudence of this court holds that the juridical person could be named in the indictment as owner of the person from which the property was charged to have been stolen.

There was some delay unquestionably on the part of the tax collecting department not to the extent, however of relieving the succession from the necessity of paying this tax.

We have seen that among the assets of the succession there are United States bonds. The judge of the district court held that they also are subject to the inheritance tax. The United States bonds have always been by the law-maker protected. Nonetheless the court of the time holds that they are not exempt by law, an interpretation from which we are not inclined to disagree.

55 Plummer *vs.* Coler, 178 U. S. 120.

In the cited case the court reviewed the jurisprudence and legislation of different States upon the subject, approvingly quotes from decisions of State courts, and concludes by holding that, under the inheritance tax laws of a State, a tax may be validly imposed upon United States bonds; that there are no contractual relations between the States and the holders of the bonds, and that, therefore, the State, as relates to this tax, may collect it upon these bonds.

While it is true that in the States in which decisions have been rendered, referred to in the Plummer case, there is no provision of law relieving the tax payer from the payment of this inheritance tax, yet, in order that legatees may receive their legacies free from taxation, it must appear that they fall within some exemption.

Those successions only are exempt here whose property have borne a just proportion of taxes. These bonds have never been taxed. Exemption from taxation is subject to strict construction. Under that constitution they cannot be held exempt. Payment of the taxes or liability therefore, is made the *sine qua non* to exemption. The State has created a new source of revenue. In order to escape from contributing, the taxpayer will have to be careful to look up the assessor and make certain that he owns all property.

The tax collector demands 10 % attorney's fees for the services of the attorney by whom he was represented in the suit for the tax.

The following from the statute is imperative: "And it shall be the duty of the district attorney to take proceedings to enforce the provisions of this act." Sec. 4. It is a complete bar to the tax collector's claim for those services.

56 Our learned brother of the district court condemned the legatees to pay the inheritance tax upon the amount of all property, bonds, securities, moneys, notes, jewelry, bills, etc., belonging to the succession as shown by the inventory and account, except the sum of $1800 value of real estate, also the amount of religious and charitable bequests.

There should also be excepted from the payment of this tax the debts of the succession, amounting to $11,998.10.

It is therefore, ordered, adjudged and decreed that the judgment appealed from be accordingly amended, and as amended, it is affirmed at the costs of appellees.

57 Petition for Rehearing.

Supreme Court of Louisiana.

Succession of MATHIAS LEVY. No. 15610.

To the honorable the chief justice and the associate justices of the supreme court of the State of Louisiana:

The petition of Camille Cahen, Mrs. Julie Kahn, Eva Cahen, Jeanne Cahen, Armand Cahen, Leon Cahen, Mathias Kahn, Yoem Kahn, Susanne Kahn, Esther Kahn, Henriette Levy, Clementine Cahen, and of William Adler and Mrs. Cerf. Hirsch, testamentary executors of the last will and testament of Mathias Levy, deceased, with due respect represents:

That there is error in your honors' judgment rendered herein in the following particulars, viz:

First. That the court erred in holding that the inheritance tax applied to the United States bonds forming part of this estate, for the reason, that under articles 235 and 236 of the constitution of the State of Louisiana of 1898, and the provisions of act No. 45 of 1904, an inheritance tax is levied upon all inheritances, legacies and donations where the property has not borne its just proportion of taxation, and the United States bonds forming part of this estate having been during the life time of the deceased exempt from taxation cannot be held to have escaped in any wise its just proportion of taxation; and, therefore, said inheritance tax does not apply to said property.

Second. That the court erred in failing to maintain the point made by petitioners in their answer, brief and oral argument that that part of the act that provides that the tax shall apply to all successions not finally closed and administered upon, deprived petitioners of the equal protection of the law, contrary to the fourteenth amendment to the Constitution of the United States in this that it requires petitioners to pay a tax while permitting others
58 whose rights vested at the same time that petitioners' rights vested to escape payment of the same.

Third. The court erred in holding that said inheritance tax was equal and uniform, as the evidence shows that certain lineal relatives, collaterals and strangers are required to pay the tax while other lineal relatives, collaterals and strangers who inherited on the same day, and under the same circumstances and similarly situated, are not required to pay.

Fourth. The court erred in holding that the act did not divest vested rights of petitioners in violation of article 166 of the State constitution of 1898, and of the fourteenth amendment to the Constitution of the United States.

Wherefore, petitioners pray, that a re-hearing be granted them,

and that upon said re-hearing, the judgment of the lower court be reversed.

Petitioners further pray they be permitted to have ten days in which to support this application by brief.

(Signed) GUSTAVE LEMLE,
(Signed) CHARLES ROSEN,
Attorneys for Petitioners.

(Endorsed:) No. 15,610. Supreme court of Louisiana. Succession of Mathias Levy. Petition for rehearing. Filed May 15, 1905. (Signed) Paul E. Mortimer, dep. clerk.

Petition for Amendment of Judgment.

Supreme Court of the State of Louisiana.

Succession of MATHIAS LEVY. No. 15610.

Succession of SAMUEL ARTHUR KOHN. No. 15629.

To the honorable the chief justice and the associate justices of the supreme court of the State of Louisiana:

This, the petition of the State tax collector, defendant and appellee her-in respectfully represents,

That the judgment herein rendered on May 8th, 1905, should be amended in two particulars;

First. If there is to be any diminution of the amount of the tax on account of the debts of the succession as set forth in said
59 opinion and decree, the court should make perfectly clear whose legacy should be the one to be affected, and

Secondly. That petitioner is strongly of the opinion that the inheritance tax as all other takes, permits no notice to be taken of the debts in the diminution of the tax.

Thirdly. That this honorable court should amend its decree so as to allow the attorney's fee of ten per cent. for the attorney for the State tax collector.

Petitioner further represents that at the time of the oral argument, he asked the court for a week in which to file a supplemental brief upon these points and he understood the court to so grant, and accordingly he was ready to file printed supplemental briefs on these points on Monday the 8th day of May, 1905, when the case was decided.

Wherefore the premises considered, petitioner prays that these supplemental briefs being now filed, that this application for amendment of judgment shall be considered by the court and judgment and decree shall be amended as herein before set forth.

(Signed) F. C. ZACHARIE,
Att'y for Defendant and Appellee.

(Endorsed:) No. 15,610. Succession of Mathias Levy. No. 15,629. Succession of S. H. Kohn. Petition for amendment of judgment. Filed May 13, 1905. (Signed) Paul E. Mortimer, dep. clerk.

Rehearing Refused.

(Extract from Minutes.)

NEW ORLEANS, WEDNESDAY, June 28, 1905.

The court was duly opened, pursuant to adjournment.

Present: Their honors Joseph A. Breaux, chief justice; Francis T. Nicholls, Frank A. Monroe, Alfred D. Land, associate justices.

Absent: Olivier O. Provosty, associate justice.

Succession of MATHIAS LEVY. No. 15610.

It is ordered that the rehearing applied for in this case be refused. (Provosty, J., dissents for reasons assigned.)

Dissenting Opinion of Mr. Justice Provosty.

60 Succession of MATHIAS LEVY. No. 15610.

Mr. Justice PROVOSTY, dissenting:

Differently from the irregular heir or the ordinary legatee, the legal heir, or the universal legatee, who stands precisely on the same footing as the legal heir, does not have to apply to the courts to be put in possession of the property he inherits, but becomes vested with the property from the moment of the death of the *de cujus*. *Le mort saisit le vif.*

The property is transmitted instantly by operation of law, and so far as legal right is concerned, is as completely vested in him from the instant of the death as it ever will be. It ceases to be an inheritance, and becomes a vested right. In my opinion, for the legislature therefor- to pass a law taxing such vested property as an inheritance is not to impose a condition upon the right of inheritance, or to tax an inheritance; but is to undertake to tax as an inheritance something which is not such, which has ceased to be such; that is to say, it is to impose an unequal tax, or, in other words, to divest a vested right, to take property without due process of law.

[Endorsed:] 15,610 Succ. Levy Provosty dissenting.

61 Petition for Writ of Error.

Supreme Court of Louisiana.

Succession of MATHIAS LEVY. No. 15610.

To the honorable the chief justice of the supreme court of Louisiana, or to the honorable the chief justice or any associate justice of the Supreme Court of the United States:

The petition of Camille Cahen, Mrs. Julie Kahn, Eva Cahen, Jeanne Cahen, Armand Cahen, Leon Cahen, Mathias Kahn, Yeom

Kahn, Susanne Kahn, Esther Kahn, Henriette Levy, Clementine Cahen, and William Adler and Mrs. Cerf Hirsch, testamentary executors, respectfully represents:

That in the above entitled and numbered cause, then pending on appeal from the civil district court, for the parish of Orleans, and wherein your petitioners were defendants and appellants, the supreme court of Louisiana on the 8th day of May 1905, rendered a decree against your petitioners in the above styled and numbered cause; by which said judgment it was ordered, adjudged and decreed that the judgment of the civil district court for the parish of Orleans, appealed from, and which ordered the payment of an inheritance tax of ten per cent. of the total value of the succession as shown by the inventory, except the sum of $1800, value of real estate, and the amount of the charitable and religious bequests, was amended by further excepting from the payment of said tax $11,998.10, the amount of debts of the succession, and as amended said judgment was affirmed.

And, that thereafter, and in due time, your petitioners filed in said supreme court of Louisiana a petition for rehearing which was by the court considered, and thereafter, on the 28th day of June 1905, overruled and denied; whereupon, and on which day and date the said judgment of the said supreme court of Louisiana, which is the highest court of said State in which a decision in said suit could be had, became and is final.

Your petitioners aver that they are aggrieved by said judg-
62 ment; and in said judgment and proceedings had prior thereto in said cause, errors were committed to the prejudice of your petitioners in this:

That there was in said suit drawn in question the validity of a statute, or an authority exercised under the United States, and the decision in said suit was against their validity; that there was drawn in question the validity of a statute or constitution of or an authority exercised under a State on the ground of their being repugnant to the Constitution of or laws of the United States, and the decision in said suit was in favor of their validity; and that rights, titles, privileges and immunities were in said suit claimed by petitioners under the constitution and statutes of and commissions held and authorities exercised under the United States, and the decision in said suit was against the titles, rights, privileges and immunities specially set up and claimed thereunder by petitioners under such constitution, statutes, commissions and authorities, as will hereafter more fully appear.

Petitioners aver that Mathias Levy departed this life on the 26th day of May 1904, leaving a last will and testament, constituting your petitioners his special and universal legatees. On the 30th day of May 1904, his succession was duly opened in the civil district court for the parish of Orleans, and on the 30th day of May 1904, the said last will and testament was duly probated and ordered

registered and executed by a judgment of the said civil district court for the parish of Orleans.

On the 28th day of June 1904, the General Assembly of the State of Louisiana adopted act No. 45, the same being an act entitled, "An act to carry into effect articles 235 and 236 of the constitution of the State of Louisiana of 1898, relative to inheritance taxes."

On the 14- day of October 1904, petitioners proceeded against the executors to compel delivery to them of the legacies mentioned in the last will and testament of Mathias Levy, which had been
63 probated and ordered registered and executed on the 30th day of May 1904, as aforesaid.

The executors answered that they had been informed by the president of the school board, that under the clause in section one, of act 45 of 1904, "This tax to be collected of all successions not finally closed or administered upon and all successions hereafter opened," that the legatees owed and would have to pay an inheritance tax, and prayed that the president of the school board be made a party to the proceedings so that it could be determined contradictorily with all parties in interest whether or not an inheritance tax was due. Subsequently the tax collector was made a party to the suit, he being the person to whom, under the law, the tax must be paid. The tax collector on being made party to the suit claimed that petitioners under said act No. 45 of 1904 owed an inheritance tax. Petitioners thereupon filed the following answer, viz:

"Now into this honorable court comes Gustave Lemle, agent and attorney-in-fact for the legatees named in the original motion on file herein, and for answer to the demand of the school board to be paid inheritance tax under act No. 45 of the General Assembly of this State for the year 1904, says,

That of the property of this estate ten thousand dollars is in United States bonds and therefore not subject to taxation by the State, and said taxation is in violation of the Constitution of the United States of America, and the laws made thereunder; that the real property of this estate has always borne its just and full proportion and amount of taxation, and none of the property of this estate is liable to the tax herein claimed.

Further answering respondent- avers that said tax is not due to said board for the reason that said act has no application to the property under this succession or the legacies due to said movers in motion aforesaid; that to give it such application would be to make said act retroactive and divest the vested rights of the said
64 movers in said rule, which would be in violation of the constitution of this State, and especially article 166 thereof, and in violation of the Constitution of the United States of America, and especially section 9 of article 1, and the fifth and fourteenth amendments thereof, and in violation of the laws of the State and of the land; that it would be a deprivation of property without due process of law and a denial of the equal protection of the laws in violation of the fifth and fourteenth amendments of the Constitution of the United States of America.

Further answering respondent- avers that said tax is unconstitutional in that it is not equal and uniform, in violation of article 255 of the constitution of the State;

Further answering respondents avers that said act is unconstitutional in that it fails to express its object in its title in violation of article 31 of the constitution of the State;

Further answering respondent- avers that said act did not become operative till after its due promulgation, which was after the final account and tableau of distribution had become final in this succession, and final judgment rendered thereon, and that it was therefore in force too late to affect said movers in said rule;

Further answering respondent- avers that said school board lost whatever rights it may have had, if any it had which is denied, by its failure to appear and oppose said accounts and tableau of distribution, and it cannot now be heard to assert any claim to any part of this estate or prevent its distribution in accordance with the terms of said final account and tableau of distribution, and the judgment of the court rendered thereon, which is now final;

Wherefore respondents prays that the demand of the school board to be paid inheritance tax on the above styled and numbered succession be rejected, and its intervention herein be dismissed at its cost, and for full and general relief."

65 Your petitioner- further states that after due proceedings had a judgment was rendered by said civil district court for the parish of Orleans, against petitioners condemning them to pay an inheritance tax of 10 % on the amount of said estate, with certain exceptions referred to in said judgment and heretofore specially set forth; that an appeal was taken from said judgment by petitioners, and upon said appeal, judgment was rendered by said supreme court of Louisiana, amending and affirming said judgment.

Your petitioners further show that upon *that upon* the death of Mathias Levy on the 30th day of May, under article- 940, 941, 942, 944, 945 / 1609 of the Revised Civil Code of Louisiana (see articles quoted in full ans annexed to this petition), and under the decisions of the honorable supreme court of Louisiana construing said articles of the Revised Civil Code (see decisions annexed to this petition), his estate passed to and became vested in his universal legatees and said universal legatees became the absolute owners of the entire estate, subject to the payment of the special legacies and debts due by the deceased Mathias Levy.

Your petitioners further show that under the principle of the laws of the State of Louisiana of *le mort saisit le vif*, the succession passed to the heirs at the moment of the death of Mathias Levy from whom they inherited.

Your petitioners further show that upon the will of Mathias Levy being probated and ordered registered and executed on the 30th day of May 1904 by the judgment of the civil district court for the parish of Orleans petitioners' rights and ownership to the legacies mentioned in said will became absolutely fixed and vested in them.

Your petitioners further show that while they are required to pay the inheritance tax because they had not collected from the executors the amounts due them, other heirs who inherited on the same day, and who bear the same relationship to those whom they inherited that petitioners bear to Mathias Levy, are not required to pay
66 any inheritance tax, where they had collected their legacies from the executors before the adoption of the act 45 of 1904.

Your petitioners further show, that the General Assembly of the State of Louisiana by enacting said act 45 of 1904, and levying said inheritance tax upon all successions not yet closed, but open and administered upon, and said honorable civil district court and supreme court of the State of Louisiana by their judgments in this cause sustaining the validity of act 45 of 1904, and requiring petitioners to pay said inheritance tax have denied to your petitioners the equal protection of the law in violation of the Constituton of the United States and especially the fourteenth amendment thereto by requiring petitioners to pay an inheritance tax upon their inheritance which passed to and was acquired by them on May 26, 1904, while not requiring payment of said tax by others who inherited and acquired at the same time and in the same way.

Petitioners further represent, that the General Assembly by enacting said law and said civil district court and said supreme court of Louisiana by their said judgment requiring petitioners to pay said tax under the provisions of act 45 of 1904, adopted June 30, 1904, promulgated July 9, 1904, and operative in New Orleans, July 30, 1904, deprived petitioners of their property by them acquired May 26, 1904, without due process of law, in violation of the Constitution of the United States of America and particularly of the fifth and fourteenth amendments thereto.

That the said supreme court of Louisiana, upon the petition for rehearing further considered said matters so set up by your petitioners and decided adversely to the same, all of which with other necessary particulars will more fully appear from a certified copy of the pleadings and proceedings had in said cause, which is annexed to and made part of this petition.

Petitioners refer to the assignment of errors filed herewith, and prays that the same be considered for the purposes of this petition as a part thereof, and further prays that a writ of error may be
67 allowed and issued herein to said supreme court of Louisiana which now has the record in said suit, for the removal of said cause into the Supreme Court of the United States, to the end that errors in said judgment and the proceedings in said cause may be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, and that the transcript of the record, proceedings and papers in said cause, duly authenticated, may be sent to the said Supreme Court of the United States.

(Signed) GUSTAVE LEMLE,
(Signed) CHARLES ROSEN,
Attorneys for Petitioners, Plaintiffs in Error.

Order.

Let the writ of error herein prayed for be granted upon petitioners furnishing bond with good and solvent security, conditioned according to law, in the sum of one thousand dollars.

(Signed) JOSEPH A. BREAUX,
Chief Justice of the Supreme Court
of the State of Louisiana.

New Orleans, July 7, 1905.

Civil Code of Louisiana.

Article 940. A succession is acquired by the legal heir, who is called by law to the inheritance, immediately after the death of the deceased person to whom he succeeds.

This rule applies also to testamentary heirs, to instituted heirs and universal legatees, but not to particular legatees.

Article 941. The right mentioned in the preceding article is acquired by the heir by the operation of the law alone, before he has taken any step to put himself in possession, or has expressed any will to accept it.

Thus children, idiots, those who are ignorant of the death of the deceased, are not the less considered as being seized of the succession though they be merely seized of right and not in fact.

68 Article 942. The heir being considered seized of the succession from the moment of its being opened, the right of possession, which the deceased had, continues in the person of the heir, as if there had been no interruption, and independent of the fact of possession.

Article 944. The heir being considered as having succeeded to the deceased from the instant of his death, the first effect of this right is that the heir transmits the succession to his own heirs, with the right of accepting or renouncing, although he himself have not accepted it, and even in case he was ignorant that the succession was opened in his favor.

Article 945. The second effect of this right is to authorize the heir to institute all the actions, even possessory ones, which the deceased had a right to institute, and to prosecute those already commenced. For the heir, in everything represents the deceased, and is of full right in his place as well for his rights as his obligations.

Article 1609. When, at the decease of the testator, there are no heirs, to whom a proportion of his property is reserved by law, the universal legatee, by the death of the testator, is seized of right of the effects of the succession, without being bound to demand the delivery thereof.

Authorities.

The heir may institute suits before he accepts or rejects the succession. O'Donald *vs.* Lobdell, 2 La. 299.

By the Roman law, and that of Spain, the acceptance of the heir was necessary to vest in him a right to interfere with the succession. The legislation in the Louisiana Code has made a material change in this part of our law. The jurisconsults charged with the preparation of this work, in the report to the General Assembly expressly state, that they thought it wise to "adopt the rule which *vests* the right of the heir from the *moment of the death of the deceased.*

This was the doctrine of the ancient law of France expressed by the well known phrase: *La mort saisit le vif.* It has been preserved in the Napoleon Code. Toullier Droit Civil Francaise
69 div. 3 title 3, chap. 1. No. 79, vol. 4 p. 79. Code Nap. 724. Porter justice in O'Donald *vs.* Lobdell, 2 La. 299.

The above cited and approved by Levy, justice in Burbridge & Co., *vs* Chenin, 34 La. Ann. 682.

Under the Code of 1808 a succession was vacant when no one claimed possession of it as heir, or under any other title. Book 3 tit. 1 art. 118. Aliter under the Civil Code of 1825. By this code the heir became *seized* of the succession by the mere operation of law, from the moment it was opened by the death of the ancestor before taking any steps to put himself in possession or expressing any willingness to accept, and even though ignorant that the succession was opened in his favor. C. C. articles 934 to 939 (R. C. C. arts. 940 to 945)

Calvitt *vs.* Mulhollam, 12 Rob. (La.) 258. The succession of a deceased person is acquired by the heirs from the moment of his death. Womack *vs.* Womack, 2 La. Ann. 339.

The impression has generally been that the maxim of the French law *le mort saisit le vif* is a rule of our jurisprudences, since the adoption of the Louisiana Code, and the seizen of the executors or administrators was a fiction of law which did not prevent that of the heir. C. C. arts. 934, 935, 936, 940.

Rost, justice in Adams *vs.* Hill 5 La. Ann. 114.

The title to one-half of the community property *is vested* in the heirs of the deceased wife at the moment of her death. Glasscock *vs.* Clark 33 La. Ann. 584.

In Burbridge *vs.* Chinn, 34 La. Ann. 682, it was held on the principle of *le mort saisit le vif*, that suit can be instituted against the heirs where the succession is a necessary party, before acceptance by them.

The heirs of the deceased become seized of the property of their ancestor at the moment of his decease. Ware *vs.* Jones, 19 La. Ann. 428.

By express provision of our law the lawful heir of a deceased person acquires the succession immediately after the death of the latter; and this right is vested in the heir by the operation of
70 the law alone, before he has taken any step to put himself in possession. *Le mort saisit le vif.* Simon, justice, in Page *vs.* Gas Light Co, 7 Rob. (La.), 184, 185.

The lawful heir inherits the succession from the moment of the decease of the person from whom he inherits, and this right is acquired by the operation of law, alone, before he has taken any step to put himself in possession. Addison *vs.* Bank, 15 La. 527.

By the principle of law *le mort saisit le vif*, the heirs' rights and obligations relate back to the ancestor's death and must be determined by the law then existing, and not as subsequently modified when those rights and obligations are enforced. Succession of Prevost, 12 La. Ann. 577. Armand Heirs *vs.* Executors, 3 La. 336.

Universal legatees and legal heirs have the same rights under the doctrine of *le mort saisit le vif.* R. C. C. arts. 940 and 884.

Assignment of Errors.

Supreme Court of Louisiana.

Succession of MATHIAS LEVY. No. 15610.

Now comes plaintiffs in error in the above entitled and numbered cause, and on their writ of error from the Supreme Court of the United States say, that in the record and proceedings in said cause, there is manifest error to their prejudice, which they assign, as follows, viz:

I. That the said supreme court of the State of Louisiana erred in deciding against the validity of an authority exercised under the authority of the United States drawn in question in this cause.

II. The said supreme court of Louisiana erred in deciding against a right, title, privilege and immunity specially set up and claimed by plaintiffs in error under the Constitution and statutes and authority exercised under the United States.

71 III. The said supreme court of Louisiana erred in deciding in favor of the validity of statutes and authorities exercised under the State of Louisiana drawn in question in this cause, on the ground of their being repugnant to the Constitution and laws of the United States.

IV. That the General Assembly of the State of Louisiana, by adopting act No. 45 of 1904, and the civil district court for the parish of Orleans, and the said supreme court of Louisiana, by requiring plaintiffs in error under said act to pay an inheritance tax, while exempting and not requiring payment of said tax by others who inherited and acquired at the same time and in the same way, have denied to plaintiffs in error the equal protection of the laws in violation of the Constitution of the United States and particularly the fourteenth amendment thereto.

V. That the General Assembly of the State of Louisiana, by adopting the said act 45 of 1904, on June 30, 1904, promulgating it on July 9, 1904 and making it operative in New Orleans on July 30, 1904, and the said civil district court for the parish of Orleans and the supreme court of the State of Louisiana, by requiring plaintiffs in error to pay an inheritance tax thereunder, deprived petitioners of their property, by them acquired May 26, 1904 and by judgment of the said civil district court for the parish of Orleans dated May 30, 1904, without due process of law in violation of the Constitution of the United States and particularly the fifth and fourteenth amendments thereto.

VI. That the civil district court erred in rendering and the said supreme court of Louisiana erred in affirming the said judgment requiring plaintiffs in error to pay an inheritance tax under the said act No. 45 of 1904.

Wherefore plaintiffs in error pray, that the judgment of the said supreme court be reversed and for such other proceedings as justice and law may require.

(Signed) GUSTAVE LEMLE,
(Signed) CHARLES ROSEN,
Att'ys for Petitioner-, Plaintiff- in Error.

72 (Endorsed:) No. 15,610. Supreme court of Louisiana. Camille Cahen, Mrs. Julie Kahn, Eva Cahen, Jeanne Cahen, Armand Cahen, Leon Cahen, Mathias Kahn, Yeom Kahn, Susanne Kahn, Esther Kahn, Henriette Levy, Clementine Cahen, and William Adler and Mrs. Ceof Hirsch, testamentory executors, plaintiffs in error. *vs.* John Brewster, tax collector of the second district, city of New Orleans and State of Louisiana, and Andrew H. Wilson, president school board city of New Orleans, State of Louisiana, defendants in error. Filed July 7, 1905. (Signed) T. McC. Hyman, clerk.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of said State in which a decision could be had in the said suit entitled Succession of Mathias Levy, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute, of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in

question the construction of the clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or ex-
73 emption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Mrs. Camille Cahen, Mrs. Julie Kahn, Eva Cahen Jeanne Cahen, Armand Cahen, Leon Cahen Mathias Kahn, Yeom Kahn, Susanne Kahn, Esther Kahn, Henriette Levy Clement Cahen, and Wm. Adler and Mrs. Cerf Hirsch testamentary executors, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within 30 days from date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 8th day of July, in the year of our Lord one thousand nine hundred and five.

[SEAL.] (Signed) H. J. CARTER,
Clerk of the Circuit Court of the United States
for the Eastern District of Louisiana.

Allowed by
(Signed) JOSEPH A. BREAUX,
Chief Justice of the Supreme Court of the
State of Louisiana.

(Endorsed:) No. 15,610. Supreme court of Louisiana. Succession of (writ of error) Mathias Levy. Copy of a writ of error lodged in the clerk's office of the supreme court of the State of Louisiana, in pursuance of the statutes in such cases made and provided, this 10th day of July one thousand nine hundred and five. (Signed) Gustave Lemle, (Signed) Charles Rosen, attorneys of plaintiffs in error. Filed July 10, 1905. T. McC. Hyman, clerk.

74 Bond for Writ of Error.

Know all men by these presents, that we, Camille Cahen, Julie Kahn, Eva Cahen, Jeanne Cahen, Armand Cahen, Leon Cahen Mathias Kahn, Yeom Kahn, Susanne Kahn, Esther Kahn, Henriette Levy, Clementine Cahen, William Adler, Mrs. Cerf Hirsch, testamentary executors, as principal, and ——— ———, as sureties are held and firmly bound unto John Brewster, State tax collector for the second district of the city of New Orleans, State of Louisiana, and Andrew H. Wilson, president school board city of New Orleans, State of Louisiana, in

the full and just sum of one thousand dollars to be paid to the said John Brewster, tax collector 2nd district city of New Orleans and Andrew H. Wilson president school board city of New Orleans, certain attorney, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, our executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this seventh day of July in the year of our Lord, one thousand nine hundred and five.

Whereas, lately at a session of the supreme court of the State of Louisiana, in a suit depending in said court, styled. Succession of Mathias Levy No. 15,610 of the docket of said court, wherein Mrs. Camille Cahen, Mrs. Julie Kahn, Eva Cahen, Jeanne Cahen, Armand Cahen, Leon Cahen, Mathias Kahn, Yeom Kahn, Susanne Kahn, Esther Kahn, Henriette Levy, Clementine Cahen, William Adler, Mrs. Cerf Hirsch, testamentary executors, were plaintiffs and John Brewster, tax collector, 2nd district city of New Orleans, State of Louisiana and Andrew H. Wilson, president school board city of New Orleans and State of Louisiana, were defendants a judgment was rendered against the said plaintiffs and the said plaintiffs having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment thereof in the clerk's office of the said court to reverse the judgment in the afore-
75 said suit, and a citation directed to the said defendants citing and admonishing them to be and appear before the United States Supreme Court to be holden at Washington District of Columbia within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said plaintiffs shall prosecute the said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

CAMILLE CAHEN,
JULIE KAHN,
EVA CAHEN,
JEANNE CAHEN,
ARMAND CAHEN,
LEON CAHEN,
MATHIAS KAHN,
YEOM KAHN,
SUSANNE KAHN,
ESTHER KAHN,
HENRIETTE LEVY,
CLEMENTINE CAHEN,
WILLIAM ADLER,
MRS. CERF HIRSCH,
By GUSTAVE LEMLE, [SEAL.]
Ag't, Att'y and Att'y in Fact.

(Signed) WM. ADLER. [SEAL.]
(Signed) MRS. CERF HIRSCH.
(Signed) CHARLES A. MORGAN.
(Signed) C. H. CULBERTSON.

Sealed and delivered in presence of—

—— ——.

—— ——.

Approved by
(Signed) JOSEPH A. BREAUX,
Chief Justice of the *the* Supreme Court of Louisiana.

UNITED STATES OF AMERICA,
Eastern District of Louisiana, } *ss:*

Personally appeared, Charles A. Morgan a[illegible] C. Culbertson who being duly sworn, deposes and says that *h*[illegible]arety on the within bond, that they resides in New Orleans [illegible]d are worth the full sum of one thousand dollars, over and a[illegible]ve all *his* debts and liabilities and property exempt from execution.

(Signed) CHARLES A. MORGAN.
(Signed) C. H. CULBERTSON.

Subscribed and sworn before me this 7th day of July 1905.

[SEAL.] (Signed) J. Q. GOWLAND,
Notary Public.

(Endorsed:) No. 15,610. Supreme court of Louisiana. Succession of Mathias Levy. Bond. Filed July 10, 1905. (Signed) T. McC. Hyman, clerk.

76 Clerk's Certificate.

UNITED STATES OF AMERICA,
State of Louisiana. }

Supreme Court of the States of Louisiana.

I, Thomas McCabe Hyman, clerk of the supreme court of the State of Louisiana do hereby certify that the foregoing seventy-five pages contain a full, true and complete copy of the proceedings had in the civil district court for the parish of Orleans, in a certain suit entitled succession of Mathias Levy, also of all the proceedings had in this supreme court on the appeal taken by said plaintiffs, which appeal is now on the files thereof under No. 15,610.

In testimony whereof I have hereunto set my hand, and affixed the seal of said court at the city of New Orleans, this twenty-fourth day of July, *anno Domini*, one thousand nine hundred and five, and in the one-hundred and thirtieth year of the Independence of the United States of America.

Seal Supreme Court of the State of Louisiana.

T. McC. HYMAN, Clerk.

77 Chief Justice's Certificate.

UNITED STATES OF AMERICA,
Supreme Court of the State of Louisiana.

I, Joseph A. Breaux, chief justice of the supreme court of the State of Louisiana, do hereby certify that Thomas McCabe Hyman is clerk of the supreme court of the State of Louisiana, that the signature of Thomas McCabe Hyman to the foregoing certificate is in the proper hand writing of him the said clerk; that said certificate is in due form of law, and that full faith and credit are due to all of his official acts as such.

In testimony whereof, I have hereunto set my hand and seal, at the city of New Orleans, this 24th, day of July *anno Domini* one thousand nine hundred and five, and in the one hundred and thirtieth year of the Independence of the United States of America.

[Seal Supreme Court of the State of Louisiana.]

JOSEPH A. BREAUX,
Chief Justice.

78 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit entitled Succession of Mathias Levy wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a
79 treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Mrs. Camille Cahen, Mrs. Julie Kahn, Eva Cahen, Jeanne Cahen, Armand Cahen, Leon Cahen, Mathias Kahn, Yoem Kahn, Susanne Kahn, Esther Kahn, Henriette Levy, Clementine Cahen, and Wm. Ad-er and Mrs. Cerf Hirsch, testamentary executors as by complaint appears. We being willing that error, if any hath been, should be duly corrected, and

full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within 30 days from the date hereof in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 8th day of July, in the year of our Lord one thousand nine hundred and five.

{ Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La. }

H. J. CARTER,
Clerk of the Circuit Court of the United States
for the Eastern District of Louisiana.

Allowed by
JOSEPH A. BREAUX,
Chief Justice of the Supreme Court
of the State of Louisiana.

Service accepted.
J. PORTER PARKER,
District Att'y P'h of Orleans,
By M. M. BOATNER,
Ass't Dist. Att'y.

80 (Endorsed:) No. 15,610, Supreme court of La. Succession of Mathias Levy. Writ of error. Filed July 10, 1905. T. McC. Hyman, clerk.

81 THE UNITED STATES OF AMERICA, }
Supreme Court of the State of Louisiana. }

The President of the United States to John Brewster, tax collector for the 2" district, city of New Orleans and State of Louisiana, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, within thirty days from the date hereof pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana at New Orleans, in the matter styled Succession of Mathias Levy No. 15610 of the docket of said court, wherein Mrs. Camille Cahen, Mrs. Julie Kahn, Eva Cahen Jeanne Cahen, Armand Cahen, Leon Cahen, Mathias Kahn, Yoem Kahn, Susanne Kahn, Esther Kahn, Henriette Levy and Clementine Kahn, and

Wm. Adler and Mrs. Cerf. Hirsch testamentary executors, are plaintiffs in error and John Brewster, tax collector for the second district of New Orleans, State of Louisiana and Andrew H. Wilson, president of the school board city of New Orleans, are defendants in error to show cause, if any there be, why the judgment rendered against the said plaintiffs in error above named as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 8th day of July, in the year of our Lord one thousand nine hundred and five.

[Seal Supreme Court of the State of Louisiana.]

JOSEPH A. BREAUX,
Chief Justice of the Supreme Court
of the State of Louisiana.

81½ [Endorsed:] 73,654 Civil D. C. Personal 14— See aut. Goy Supreme court of the State of Louisiana. No. 15610 Succession of Mathias Levy Citation. Filed July 19, 1905 T. McC. Hyman clerk Brewster

Sheriff's Return.

Received Tuesday Jul- 11 1905 and on the 14th day of July 1905, I served a copy of the within citation on John Brewster tax collector for the second district city of New Orleans and State of Louisiana defendant herein in person

Returned same day

Sheriff's fees —

C. M. GOSS,
Deputy Sheriff of Orleans Parish, State of Louisiana.

Christian M. Goss deputy civil sheriff parish of Orleans State of Louisiana, being duly sworn, deposeth & says that he made a personal service of a copy of the within citation on John Brewster tax collector for the second district city of New Orleans and State of Louisiana

C. M. GOSS.

Sworn to and subscribed before me, at the city of New Orleans, this 19th day of July, A. D. 1905.

[Seal Supreme Court of the State of Louisiana.]

T. McC. HYMAN,
Clerk Supreme Court La.

82 THE UNITED STATES OF AMERICA, }
Supreme Court of the State of Louisiana. }

The President of the United States to Andrew H. Wilson, president school board city of New Orleans, State of Louisiana, Greeting:

You are hereby cited and and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, within thirty days from the date hereof pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana at New Orleans, in the matter styled Succession of Mathias Levy, No. 15610 of the docket of said court, wherein Mrs. Camille Cahen, Mrs. Julie Kahn, Eva Cahen, Jeanne Cahen, Armand Cahen, Leon Cahen, Mathias Kahn, Yoem Kahn, Susanne Kahn, Esther Kahn, Henriette Levy and Clementine Kahn, and Wm. Adler and Mrs. Serf. Hirsch, testamentary executors, are plaintiffs in error, and John Brewster, tax collector for the second district of the city of New Orleans, State of Louisiana and Andrew H. Wilson, president of the school board city of New Orleans, are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error above named as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 8th day of July in the year of our Lord one thousand nine hundred and five.

[Seal Supreme Court of the State of Louisiana.]

JOSEPH A. BREAUX,
Chief Justice of the Supreme Court
of the State of Louisiana.

83 [Endorsed:] Personal 12/05 Goss Supreme court of the State of Louisiana. No. 15610 Succession of Mathias Levy Citation. Filed July 19, 1905 T. McC. Hyman clerk Wilson

Sheriff's Return.

Received Tuesday Jul- 11 1905 and on the 12th day of July 1905 I served a copy of the within citation on Andrew H. Wilson president school board city of New Orleans, State of Louisiana, defendant herein in person

Returned same day

Sheriff's fees —

C. M. GOSS,
Deputy Sheriff of Orleans Parish, State of Louisiana.

Christian M. Goss deputy civil sheriff parish of Orleans State of Louisiana being sworn, deposeth & says that he made a personal service of a copy of the within citation on Andrew H. Wilson, president school board city of New Orleans, State of Louisiana

C. M. GOSS.

Sworn to & subscribed before me, at the city of New Orleans, this 19th day of July, A. D. 1905

[Seal Supreme Court of the State of Louisiana.]

T. McC. HYMAN,
Clerk Supreme Court, La.

Endorsed on cover: File No. 19,863. Louisiana supreme court. Term No. 361. Mrs. Camille Cahen, Mrs. Julie Kahn, Eva Cahen, *et al.*, plaintiffs in error, *vs.* John Brewster, tax collector for the 2d district of the city of New Orleans, State of Louisiana, and Andrew H. Wilson, president school board of the city of New Orleans, State of Louisiana. Filed July 28th, 1905. File No. 19,863.

PLAINTIFF'S BRIEF

FILE COPY.

Office Supreme Court, U. S.
FILED.
NOV 2 1906
JAMES H. McKENNEY,
CLERK.

(19,863)

Supreme Court of the United States

OCTOBER TERM, 1906.

NO. 21.

MRS. CAMILLE CAHEN, MRS. JULIE KAHN, EVA CAHEN ET AL.
Plaintiffs in Error,

versus

JOHN BREWSTER, TAX COLLECTOR FOR THE SECOND DISTRICT OF THE CITY OF NEW ORLEANS, STATE OF LOUISIANA, AND ANDREW H. WILSON, PRESIDENT SCHOOL BOARD OF THE CITY OF NEW ORLEANS, STATE OF LOUISIANA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

GUSTAVE LEMLE,
CHARLES ROSEN,
Attorneys for Plaintiffs in Error.

J. G. Hauser, "The Legal Printer," 402 Camp St., N. O., La.

(19,863)

Supreme Court of the United States

OCTOBER TERM, 1906.

NO. 91.

MRS. CAMILLE CAHEN, MRS. JULIE KAHN, EVA CAHEN ET AL.
Plaintiffs in Error,

versus

JOHN BREWSTER, TAX COLLECTOR FOR THE SECOND DISTRICT OF THE CITY OF NEW ORLEANS, STATE OF LOUISIANA, AND ANDREW H. WILSON, PRESIDENT SCHOOL BOARD OF THE CITY OF NEW ORLEANS, STATE OF LOUISIANA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Statement of Facts and Pleadings.

This is a writ of error to the Supreme Court of Louisiana, granted by the Chief Justice of that Court, to review its judgment amending and affirming a judgment of Division A of the Civil District Court for the Parish of Orleans, State of Louisiana, condemning the plain-

tiffs in error, Camille Cahen, Julie Kahn, Eva Cahen, Jeanne Cahen, Armand Cahen, Leon Cahen, Mathias Kahn, Yeom Kahn, Suzanne Kahn, Esther Kahn, Henriette Levy and Clementine Levy, to pay an inheritance tax on the legacies bequeathed to them by Mathias Levy, the deceased, and ordering the Succession of said Mathias Levy, through its testamentary executors, William Adler and Mrs. Cerf Hirsch, plaintiffs in error, to pay said inheritance tax out of the funds in their hands.

The undisputed facts, disclosed by the record, are as follows:

Mathias Levy, the decedent, a resident of New Orleans, died in that city on *May 26, 1904.*

(Transcript, pp. 1 and 2.)

He was unmarried and left no ascendants, and was, therefore, without forced heirs.

(Transcript, p. 36.)

He left a last will and testament in nuncupative form by public act, of date December 23, 1903, in which he named William Adler and Mrs. Cerf Hirsch his joint executors, and, after sundry particular bequests to charitable and religious institutions, and to the legatees, Eva, Jeanne, Armand and Leon Cahen, Mathias, Yeom, Suzanne and Esther Kahn, Henriette Levy and Clementine Levy, he bequeathed the balance of his estate, in equal shares, to his two nieces, Camille Cahen and Julie Kahn, thereby constituting them his univesal legatees and instituted heirs.

(Transcript, pp. 2-3.)

This will was duly probated by the District Court on May 30, 1904.

(Transcript, p. 2.)

The inventory of his estate, taken June 9, 1904, showed real estate appraised at $1,800, and money, stocks, bonds, silver jewelry and other personal property, appraised at $57,262.47, or a total valuation of $59,062.47.

(Transcript, pp. 4 and 8.)

A supplemental inventory showed a further sum of money, amounting to $5,613.58.

(Transcript, pp. 8 and 9.)

So that the total appraised value of the estate was $64,676.05.

The debts and charges of the estate amounted to $11,999.11, the particular legacies to $9,000, and certain expenditures for the tomb of the deceased to $750, a total of $21,748.11, which, deducted from the amount of the estate, $64,676.05, left as the portion coming to the *universal* legatees, in money, stocks, bonds, real estate, silver, jewelry, and other personal effects, $42,927.94.

(Transcript, pp. 10-13.)

When Mathias Levy died on May 26, 1904, and when his will was probated on May 30, 1904, there was no inheritance tax in Louisiana.

On June 28, 1904, an act was passed by the Louisiana Legislature, imposing such a tax, three per cent. on inheritances of ascendants or descendants, and ten per cent. on all property bequeathed to or inherited by col-

lateral heirs. This act was promulgated July 9, 1904, and became operative in New Orleans, July 30, 1904.

(Transcript, p. 21.)

This is Act 45 of 1904, entitled: "An Act to carry into effect Articles 235 and 236 of the Constitution of 1898, relative to Inhertance Taxes."

Section 1 of the Act contained the following provision:

> "This tax to be collected on all successions not finally closed and administered upon and on all successions hereafter opened."

On October 14, 1904, the universal and particular legatees, through their counsel and attorney in fact, filed a proceeding to compel the testamenary executors to deliver to them their respective legacies, which, all the debts and charges having been paid, represented the entire estate.

(Transcript, pp. 14-15.)

To this the executors made answer, stating their willingness to comply with the demand, but averring the passage of Act 45 of 1904, imposing an inheritance tax of ten per cent., and the claim of the School Board, the beneficiary of the tax, thereto; and alleging the unconstitutionality and inapplicability of the tax on the ground therein stated, and raising particularly the Federal questions that the act, so far as its retrospective operation divested vested rights, was in violation of the Fourteenth Amendment of the Constitution of the United States, in

that it operated a deprivation of property without due process of law, and a denial of the equal protection of the laws.

(Transcript, pp. 15-16.)

The President of the School Board appeared, and averred the legality of the tax, but excepted that the State Tax Collector, whose duty it was to collect the tax, should be made a party to the proceeding.

(Transcript, p. 17.)

Thereafter, the State Tax Collector appeared and filed an answer, averring the legality of the tax, and praying for judgment for the amount of the tax.

(Transcript, p. 18.)

Thereupon, the legatees, through their counsel and attorney in fact, set up the unconstitutionality of the provision applying the tax to "all successions not finally closed and administered upon," so far as it affected this estate, on the grounds, among others, heretofore stated: "That it constituted a deprivation of property without due process of law, and a denial of the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States."

(Transcript, pp. 18-19.)

The Judge of the District Court rendered judgment condemning the executors to pay the tax of ten per cent. upon the value of the property of the succession as shown by the inventory and the final account of the executors, less the amount of United States bonds and the charitable and religious bequests exempted by law not taxable.

Upon an application for a new trial by the legatees and the executors, it was shown that the real estate had, in the language of the statute, "borne its just proportion of taxation," and was, therefore, exempt. The Court further concluded that the United States bonds were not exempt; and the judgment was accordingly amended in favor of the Tax Collector, so as to order "the Succession of Mathias Levy, through its testamentary executors, to pay the inheritance tax of ten per cent upon the amount of all the property—bonds, securities, moneys, notes, jewelry, bills, etc.—belonging to this succession, as shown by the inventory and account, excepting the sum of eighteen hundred dollars, value of the real estate, and also the amounts of the religious and charitable bequests."

(Transcript, p. 27.)

From this judgment, the legatees and the executors prosecuted an appeal to the Supreme Court of Louisiana, which amended the judgment by deducting from the appraised value of the inventory the debts of the succession, amounting to $11,998.10; and, as thus amended, the judgment was affirmed.

(Transcript, pp. 35-40.)

The legatees and the executors filed an application for rehearing, which was refused, his Honor Justice Provosty dissenting.

(Transcript, pp. 41-43.)

That being the highest Court in the State, the legatees and the executors filed their petition for writ of error,

with the necessary assignment of errors, and the writ was granted by the Chief Justice of the Supreme Court of Louisiana, and service duly made.

(Transcript, pp. 43-59.)

The questions raised, and assigned as error by this record, are, therefore, these:

First. Does Act 45 of 1904, of the General Assembly of the State, in so far as it exacts an inheritance tax of ten per cent. from the legatees and heirs of this estate, violate the Fourteenth Amendment of the Constitution of the United States by depriving them of their property without due process of law?

Second. Does said act, in so far as it exacts said tax from the legatees and heirs of this estate, violate said amendment by denying them the equal protection of the laws.

I.

Deprivation of Property Without Due Process of Law.

The articles of the Constitution of 1898 of Louisiana authorizing the imposition of an inheritance tax are as follows:

> "Article 235. The Legislature shall have power to levy, solely for the support of the public schools, a tax upon all inheritances, legacies and donations; provided, no direct inheritance, or donation, to an ascendant or descendant, below ten thousand dollars in amount or value, shall be so taxed; provided, further, that no such tax shall exceed three per cent.

for direct inheritances and donations to ascendants or descendants, and ten per cent. for collateral inheritances, and donations to collaterals or strangers; provided, bequests to educational, religious or charitable institutions shall be exempt from this tax.

"ARTICLE 236. The tax provided for in the preceding article shall not be enforced when the property donated or inherited shall have borne its just proportion of taxes prior to the time of such donation or inheritance."

The act of the Legislature carrying this power into effect is as follows:

"SECTION 1. *Be it enacted by the General Assembly of the State of Louisiana,* That there is now, and shall hereafter be, levied, solely for the support of the public schools, a tax upon all inheritances, legacies and donations; provided, no direct inheritance, or donation, to an ascendant or descendant, below ten thousand dollars in amount or value, shall be so taxed; a special inheritance tax, of three per cent. on direct inheritances and donations to ascendants or descendants, and ten per cent. for collateral inheritances and donations to collaterals or strangers; provided, bequests to educational, religious or charitable institutions shall be exempt from this tax; and provided, further, that this tax shall not be enforced when the property donated or inherited shall have borne its just proportion of taxes prior to the time of such donation or inheritance; *this tax to be collected on all successions not finally closed and administered upon, and on all successions hereafter opened.*" (Italics ours.)

From this it will be seen that the articles in the Constitution were not self-operative, but merely conferred

upon the Legislature the "power" to levy such tax under the limitations and conditions therein named. The articles of the Constitution nowhere state that the tax, when levied, shall retroact and divest vested rights, nor authorize the Legislature to make the tax thus retrospective. So that the addition of the clause, "this tax to be collected on all successions not finally closed and administered upon," not contained in nor authorized by the articles of the Constitution, which conferred the power, were inserted by the Legislature alone.

The framers of the Constitution never had in contemplation the imposition of a tax that would retroact so as to interfere with rights long since acquired, and it remains to inquire whether the act of the Legislature undertaking to do so is valid.

The Constitution of the State of Louisiana does not prohibit the passing of retroactive laws as such, but it does prohibit the divesting of vested rights.

Article 166 of the Constitution of the State reads:

> "No *ex post facto* law, nor any law impairing the obligations of contracts, shall be passed, nor vested rights be divested, unless for purposes of public utility, and for adequate compensation previously made."

Nor is the contention here made that the law as made is merely retroactive, but that it divests vested rights, and, as such, is not only objectionable to the State Constitution, but to the Fourteenth Amendment of the Constitution of the United States.

The following propositions are submitted:

1. That an inheritance tax is not a tax on property, but on the right or privilege of inheriting.

2. That the rights of these heirs and legatees vested, and their privilege of inheriting was exercised, under the existing law at the moment of their testator's death and prior to the passage of the law imposing a tax on such privilege or right of inheriting.

3. That, as the tax imposed is a tax on the right of inheriting, and this right had been already exercised, no such tax can be exacted.

4. That, therefore, to pass a law exacting such tax and making it retroact so as to divest a right previously acquired under then existing laws, is a deprivation of property already acquired without due process of law, prohibited by the Fourteenth Amendment of the United States.

5. And that, to exact such tax from heirs of estates not yet finally closed, and not to exact it from other heirs similarly situated—in the same class, inheriting at the same time, by the same title, and under the same right—is a denial of the equal protection of the laws, and contrary to the Fourteenth Amendment of the Constitution of the United States.

I.

That an inheritance tax is not a tax on property, but on the privilege or right of inheriting, is no longer open to question. Without discussing the matter anew,

or citing a multitude of other authorities to that effect it is sufficient to refer the Court to its own decisions in the following cases:

In **United States vs. Perkins, 163 U. S. 625, 41 L. Ed. 287**, this Court, speaking of the nature of an inheritance tax, said:

> "Thus, the tax is not upon the property in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee.
>
> "That the tax is not a tax upon the property itself, but upon its transmission by will or descent, is also held both in New York and in several other States."

In **Magoun vs. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. Ed. 1037**, the Court said:

> "It is not necessary to review these cases or state at length the reasoning by which they are supported. They are based on two principles: (1) An inheritance tax is not one on property, but one on the succession. (2) The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege; and, therefore, the authority which confers it may impose conditions upon it. From these principles it is deduced that the State may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective State Constitutions requiring uniformity and equality of taxation."

In **Knowlton vs. Moore, 178 U. S. 41, 44 L. Ed. 969**, the Court said:

> "Thus, looking over the whole field, and considering death duties in the order in which we have

reviewed them—that is, in the Roman and ancient law, in that of modern France, Germany and other Continental countries, in England, and those of her colonies where such laws have been enacted, in the legislation of the United States and the several States of the Union—the following appears: Although different modes of assessing such duties prevail, and although they have different accidental names, such as 'probate duties,' 'stamp duties,' 'taxes on the transaction,' or the 'act of passing of an estate or a succession,' 'legacy taxes,' 'estate taxes,' or 'privileges taxes'—nevertheless, tax laws of this nature, in all countries, rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested."

And in **Plummer vs. Coler, 178 U. S. 115, 44 L. Ed. 998,** the Court said:

"We think the conclusion fairly to be drawn from the State and Federal cases is that the right to take property by will, or descent, is derived from, and regulated by, municipal law; that, in assessing a tax upon such right or privilege, the State may lawfully measure or fix the amount of the tax by referring to the value of the property passing; and that the incidental fact that such property is composed, in whole or in part, of Federal securities, does not invalidate the tax or the law under which it is imposed."

And, as said in **Amer. & Eng. Ency. Law,** this principle is generally accepted.

"The theory on which taxation on the devolution of estates at the death of their owners is based, and

its validity upheld, is clearly established. This theory is founded on two principles: First, an inheritance tax is not one on property, *but one on the right of succession thereto;* and, second, the right to take property by devise or descent is the creature of the law, and not a natural right—it is a privilege, and, therefore, the authority which confers it may impose conditions on it."

Amer. & Eng. Ency. of Law, Vol. 27. p. 338.

II.

That the rights of these heirs and legatees vested at the moment of the death of the ancestor is also beyond dispute.

Says **Mr. Black**, in his work on **Constitutional Prohibitions (Ed. 1887), p. 239:**

> "Again, a will does not take effect, nor are there any rights acquired under it, *until the death of the testator;* and its construction must depend upon the law as it stands at the time of that event. Consequently, a statute passed after the making of a will, but before the death of the testator, by which the common law in this respect is changed, will operate upon the will. To give the statute such an effect is not to make it retroactive in its operation, since it affects no rights vested before its passage."
>
> Black's Constitution Prohibitions 239.

So says **Cooley, Constitutional Limitations (6 Ed.), 439:**

> "And it is because a mere expectation of property in the future is not considered a vested right that the rules of descent are held subject to change in their application to all estates *not already passed to the heir by death of the owner.* No one is heir to the

living; and the heir presumptive has no other reason to rely upon succeeding to the property than the promise held out by the Statute of Descents. But this promise is no more than a declaration of the Legislature as to its present view of public policy as regards the proper order of succession—a view which may at any time change—and then the promise may be properly withdrawn, and a new course of descent be declared. The expectation is not property. It cannot be sold or mortgaged; it is not subject to debts, and it is not in any manner taken notice of by the law until the moment of the ancestor's death, when the Statute of Descents comes in, and for reasons of general public policy transfers the estate to persons occupying particular relations to the deceased in preference to all others. It is not until that moment that there is any vested right in the person who becomes heir, to be protected by the Constitution."

Cooley's Constitutional Limitations, Sixth Edition, page 439.

So says **Prof. McGehee** in his late work on **Due Process of Law (1906)**:

"The rights which are thus within the protection of due process of law have been called 'vested rights,' and a vested right has been defined as a right vested in a citizen 'to do certain actions, or to possess certain things, according to the law of the land.' Approached from another point of view, a vested right is one which is complete and consummated, so that nothing remains to be done to fix the right of the individual to enjoy it. This conception is derived from real-property law, as is shown by the use of definitions of vested estates to characterize vested rights. Thus, in *Pearsall vs. Great Northern R. Co.*, the Supreme Court of the United States

U.S. 673

said: 'A "vested right" is defined by Fearne, in his work upon Contingent Remainders, as "an immediate, fixed right of present or future enjoyment"; and by Chancellor Kent as "an immediate right of present enjoyment, or a present fixed right of future enjoyment".' It is said by Mr. Justice Cooley that 'rights are vested, in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons, as a present interest. They are expectant when they depend upon the conditioned existence of the present condition of things until the happening of some future event. They are contingent when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting.' "

McGehee's Due Process of Law, pages 142-144.

And, further on, Mr. Black, in his work on Constitutional Prohibitions, says:

"The constitutionality of statutes affecting the property rights incident to the marriage relation must also be tested by the same principle—the difference in law between a vested right and a mere expectation of a future interest. At common law, the husband, immediately upon the marriage, succeeded to certain rights in the real and personal estate which the wife then possessed. These rights became vested rights at once by virtue of the marriage. Hence, a statute repealing or modifying the common law in this respect can have no retroactive effect upon the interests of this character arising out of marriages previously contracted. Thus, a statute of the District of Columbia provided that 'the right of any married woman to any property belonging to her at the time of marriage, or acquired

during marriage, shall be as absolute as if she were not married.' It was held that this law was not designed to have a retroactive effect, so as to divest the vested right of a husband in his wife's property; but, if it were so intended, it would be unconstitutional. But the case is different in regard to the husband's expectant interest in the after-acquired personalty of the wife. This depends, in a certain sense, on the marriage, but cannot be properly regarded as a vested right until made tangible by the acquisition.

"In regard to tenancy by the courtesy, it must be remembered that this species of estate does not arise from the marriage alone. It depends upon the happening of a future event. Until it becomes initiate, by the birth of a child capable of inheriting, it is a mere expectation and no vested estate. After that, though not yet *consummate* till the death of the wife, it is regarded as a vested right which must not be disturbed by retroactive legislation. At the common law, the husband could have a right, as tenant by the courtesy initiate, in the wife's estate of inheritance the moment a child was born of the marriage, who might by possibility become heir to such estate. This right would be property, subject to conveyance and to be taken for debts; and must, therefore, be regarded as a vested right, no more subject to legislative interference than other expectant interests which have ceased to be mere contingencies and become fixed. But while this interest remains in expectancy merely—that is to say, until it becomes initiate—the Legislature must have full right to modify it, or even to abolish it. Hence, the statutes passed in several of the American States, purporting to abolish estates by curtesy, may constitutionally apply to all future marriages, and to such antecedent marriages as had not yet given rise to an initiate tenancy; but not to cases where a tenancy by the

curtesy initiate, or in full enjoyemnt, existed at the passage of the act.

"The law is much the same in regard to dower, except that the right to the latter remains a mere inchoate interest or expectancy (or a capacity to *acquire* a right) until consummated by the death of the husband. As we have already seen, dower arises by operation of the law, and not by force of any contract; and, hence, a statute affecting this matter does not fall within the constitutional prohibition of laws impairing the obligation of contracts, no matter what changes it may effect. But, when we consider such a statute in relation to its effect on vested rights, a different question arises. The law appears to be well settled that the wife has no vested right of any kind to dower in the estate of her husband before his decease, and, until that event, her right may be modified, changed or abolished by the Legislature. Hence, a statute restricting a widow's right of dower in lands mortgaged by her husband before marriage applies to all cases where the death of the husband occurs after the act was passed, although the mortgage may have been redeemed before that time. But an act empowering the owner of land subject to a dower interest to hold discharged therefrom, on giving security for the payment of the annual value of the interest, is unconstitutional so far as it relates to dower assigned before its enactment."

Black's Constitutional Prohibitions, pages 239 to 242.

It clearly follows that both the universal and particular legatees in the present case acquired vested rights at the death of the testator.

While a distinction is taken under the common law and the law of other States between the inherison of

real estate and that of personal property, in that the former vests in the heir on the death of the *de cujus*, while the title to the latter vests in the executor or administrator for distribution to the legal distributees; and even the real estate is held and administered by the testator or administrator, with right to possession until a judgment of Court recognizes the heir and sends him into possession; yet, under the civil law, as it prevails in Louisiana, this is not true, as the property, both real and personal, passes to the heir at the very moment of death, without administration, and without the intervention of a Court. See 32 Jur Am 1020 State vs Brown where the court draws the distinction between so many

In **Volume 14 of Cyclopedia of Law and Procedure, pp. 102-105,** the law under other systems is thus stated:

> "By the common law, and under the statutes in most of the States, the title to real property vests in the heir or heirs immediately on the death of the intestate, subject to dower of the widow, or rights of the husband as tenant by the curtesy, and to homestead rights, and, in most jurisdictions, to the debts of the intestate, and to the exercise of such special powers as may be conferred upon the administrator by statute, as the right to possession and the right to sell for payment of debts, etc. The heir, of course, succeeds to the title and interest of the intestate, and to nothing more."
>
> **Cyclopedia of Law and Procedure, Vol. 14, pages 102-104.**

> "At common law, and under the statutes in most of the States, the title to chattels real of an intestate, and to personal property generally, vests in the administrator, and not in the heirs or distributees,

and their rights, therefore, must generally be enforced through administration and distribution. The legal title to personal property is suspended between the time of the intestate's death and the granting of the letters of administration. When the letters are granted, the title of the administrator relates back to the time of the intestate's death."

Cyclopedia of Law and Procedure, Vol. 14, pages 105-107.

But, in Louisiana, this is not true as to forced heirs and universal legatees. It is true of the particular legatees, but not of the forced heirs, nor of the universal legatees, the instituted heirs, who stand in the place of the forced heirs.

That, under the law of Louisiana, the transmission to the heir takes place at the moment of the death of the testator, without any administration or distribution, or the necessity of any judgment of Court, does not admit of doubt.

The decedent in this case left no ascendants or descendants, and, therefore, was without forced heirs. By his will, he instituted as his heirs his two nieces, Camille Cahen and Julie Kahn. As his universal legatees, they were seized of his estate at the instant of his death, without the intervention of any Court, without the necessity of any judgment of recognition, without any right in the executors of possession and administration.

This doctrine is what is known in the civil law as the doctrine of *Le mort saisit le vif*—the dead seizes the living. It is not a mere fiction; it is a principle of our

law, recognizing as a fact, and as an absolute vested right, the instant transmission to the heir of the property of the deceased at the moment of death.

The provisions of the Louisiana Civil Code on this are too clear to admit of discussion:

> "ARTICLE 940. A succession is acquired by the legal heir, who is called by law to the inheritance, immediately after the death of the deceased person to whom he succeeds.
>
> "This rule applies also to testamentary heirs, to instituted heirs and universal legatees, but not to particular legatees.
>
> "ARTICLE 941. The right mentioned in the preceding article is acquired by the heir, by the operation of the law alone, before he has taken any step to put himself in possession, or has expressed any wish to accept it.
>
> "Thus, children, idiots, those who are ignorant of the death of the deceased, are not the less considered as being seized of the succession though they may be merely seized of right and not in fact.
>
> "ARTICLE 942. The heir being considered seized of the succession from the moment of its being opened, the right of possession, which the deceased had, continues in the person of the heir, as if there had been no interruption, and independent of the fact of possession."
>
> "ARTICLE 944. The heir being considered as having succeeded to the deceased from the instant of his death, the first effect of this right is that the heir transmits the succession to his own heirs, with the right of accepting or renouncing, although he himself have not accepted it, and even in case he was ignorant that the succession was opened in his favor.

"ARTICLE 945. The second effect of this right is to authorize the heir to institute all the actions, even possessory ones, which the deceased had a right to institute, and to prosecute those already commenced. For the heir, in everything, represents the deceased, and is of full right in his place, as well for his rights as his obligations."

"ARTICLE 1609. When, at the decease of the testator, there are no heirs, to whom a proportion of his property is reserved by law, the universal legatee, by the death of the testator, is seized of right of the effects of the succession, without being bound to demand the delivery thereof."

From these provisions of our Code, your Honors will see that, as to the legal heirs, and where (as here) there are no forced heirs, as to the universal legatee, the "succession is acquired" immediately after the death of the deceased person to whom they succeed; that the "right mentioned is acquired by the heir, by the operation of the law alone, before he has taken any steps to put himself in possession, or has expressed any wish to accept it"; that "the right of possession which the deceased had continues in the person of the heir as if there had been no interruption and independent of the fact of possession"; that "the heir is considered to have succeeded to the deceased from the instant of death, and, therefore, transmits the succession to his own heirs, even if he has not accepted it, and even if he were ignorant of it"; that "he can institute all actions, even possessory ones, which the deceased had the right to institute, and in everything represents the deceased, and is of full right in his place";

and, finally, that, in the absence of forced heirs (as here), the "universal legatee is seized of right of the effects of the succession, without being bound to demand the delivery thereof."

And this doctrine has been applied in a variety of cases by the Supreme Court of Louisiana.

In the case of **O'Donald vs. Lobdell, 2 La. 299,** it was held that "the heir may institute suits before he accepts or rejects the succession."

To quote Justice Porter in that case:

> "By the Roman law, and that of Spain, the acceptance of the heir was necessary to vest in him a right to interfere with the succession. The legislation in the Louisiana Code has made a material change in this part of our law. The jurisconsults charged with the preparation of this work, in the report to the General Assembly, expressly state that they thought it wise to 'adopt the rule which vests the right of the heir from the moment of the death of the deceased.' This was the doctrine of the ancient law of France, expressed by the well-known phrase: *Le mort saisit le vif.* It has been preserved in the Napoleon Code."
>
> **Touillier, Droit Civile Francaise, Div. 3, Title 3, Chap. 1; No. 79, Vol. 4, p. 79.**
> **Code Nap. 724.**

This was cited and approved by the Court in **Burbridge & Co. vs. Chinn, 34 La. An. 682,** in which it was held, on the principle of *Le mort saisit le vif,* that suit can be instituted against the heirs where the succession is a necessary party before acceptance by them.

> "Under the Code of 1808 a succession was vacant when no one claimed possession of it as heir, or under

any other title. (Book 3, Title 1, Art. 118.) *Aliter*, under the Civil Code of 1825. By this Code the heir became seized of the succession, by the mere operation of law, from the moment it was opened by the death of the ancestor, before taking any steps to put himself in possession or expressing any willingness to accept, and even though ignorant that the succession was opened in his favor. (C. C., Articles 934 to 939; R. C. C., Arts. 940 to 945.)"

Calvitt vs. Mulhollam, 12 Rob. (La.) 258.

"The succession of a deceased person is acquired by the heirs from the moment of his death."

Womack vs. Womack, 2 La. An. 339.

"The impression has generally been that the maxim of the French law, *Le mort saisit le vif*, is a rule of our jurisprudence since the adoption of the Louisiana Code, and the seizen of executors or administrators was a fiction of law which did not prevent that of the heir. (C. C., Arts. 934, 935, 936, 940.)"

Adams vs. Hill, 5 La. An. 114.

"The title of one-half of the community property *is vested* in the heirs of the deceased wife at the moment of her death."

Glassock vs. Clark, 33 La. An. 584.

"The heirs of the deceased become seized of the property of their ancestor at the moment of his decease."

Ware vs. Jones, 19 La. An. 428.

"By express provision of our law, the lawful heir of a deceased person acquires the succession immediately after the death of the latter; and this right is vested in the heir, by the operation of the law

alone, before he has taken any step to put himself in possession. *Le mort saisit le vif.*"

Page vs. Gas Light Co., 7 Rob. (La.) 184, 185.

"The lawful heir inherits the succession from the moment of the decease of the person from whom he inherits, and this right is acquired by the operation of the law, alone, before he has taken any step to put himself in possession."

Addison vs. Bank, 15 La. 527.

"By the principle of the law, *Le mort saisit le vif*, the heir's rights and obligations relate back to the ancestor's death, and must be determined by the law then existing, and not as subsequently modified when those rights and obligations are enforced."

Succession of Prevost, 12 La. An. 577; Armand Heirs vs. Executors, 3 La. 336.

Nor, in the case at bar, does the Supreme Court of Louisiana assert any different doctrine.

It merely decides that the investiture of the heir did not prevent the subsequent imposition of a tax; and it so held, as it said, because the "property" was still "within the limits of the State."

In other words, what the Court decided was only this:

"Furthermore, we have said the legatees acquired no vested right to the property bequeathed, which could enable them to successfully defend their inheritance against the demand of the State for the inheritance tax."

That is to say, not that the right did not vest, but that the vesting did not defeat the State's power to impose a tax for the acquisition of that right.

This, however, is the precise constitutional question involved in the case, not the interpretation of a local law; and, in determining that constitutional question, this Court, of course, will reach its own conclusion.

In the present case, not only did the Supreme Court of Louisiana not deny the doctrine of *Le mort saisit le vif*, but, on the contrary, it recognized it—if not in express terms in the decision, at least, by implication and by the failure to negative it, and by assuming it to be true.

The doctrine is clearly stated by the dissenting Justice, Provosty, who said:

> "Differently from the irregular heir or the ordinary legatee, the legal heir, or the universal legatee, who stands precisely on the same footing as the legal heir, does not have to apply to the Courts to be put in possession of the property he inherits, but becomes vested with the property from the moment of the death of the *de cujus*. *'Le mort saisit le vif.'*
>
> "The property is transmitted instantly by operation of the law, and, so far as the legal right is concerned, is as completely vested in him from the instant of the death as it ever will be. It ceases to be an inheritance, and it becomes a vested right. In my opinion, for the Legislature, therefore, to pass a law taxing such vested property as an inheritance, is not to impose a condition upon the right of inheritance, but is to undertake to tax as an inheritance something which is not such, which has ceased to be such; that is to say, it is to impose an unequal tax, or, in other words, to divest a vested right—to take property without due process of law."

But that the doctrine contended for is not denied by the Court, as, indeed, in the face of the plain provisions

of our Civil Code, it could not well be, is best seen in the Supreme Court of Louisiana's own interpretation of the decision in the subsequent and late case of **Tulane University of Louisiana vs. Board of Assessors,** decided December 18, 1905, and reported in **40 Southern Rep. 445, 115 La. 1025,** in which the learned counsel for the defendants in error in this cause contended for a different application and relied on the case at bar to sustain his contentions.

In that case the plaintiff university sought to have declared null and void certain assessments on property bequeathed to it by Alexander Hutchinson, the property of the university being exempt under the State Constitution. The Board of Assessors, represented by the learned counsel for defendants in error in this case, contended, on the authority of the decision in the present case, that the doctrine, "*Le mort saisit le vif,*" did not vest immediate title to the decedent's property in the university, his universal legatee, but that a judgment of recognition and possession was necessary, and that, until then, the Board of Assessors could assess it. But the Court held that, on the death of the testator, the title vested at once, wihout a judgment and withou possession, and that the property, *at the instant of death,* came under the domain of the constitutional exemption; and, referring to the decision in this cause, said that "the maxim, '*Le mort saisit le vif,*' was expressly recognized."

To quote fully from the decision:

> "Our Code leaves no room whatever for doubt or surmise as to the fact of the property of a deceased person being transmitted directly and immediately

to the legal heir, or, in the absence of forced heirs, *to the universal legatee, without any intermediate stage, when it would be vested in the succession representative, or in the legal abstract, called 'succession.'* The law on that point is so explicitly stated in the Code, and has been so frequently applied, that nothing more is needed here than to give the numbers of the articles of the Code bearing upon the point, and the pages of the reports where a few of the very numerous decisions are to be found: Articles 940, 941, 942, 943, 944, 945, 946, 947, 1609, 1611 and 1671; *Womack vs. Womack,* 2 La. An. 341; *Frazer vs. Hills,* 5 La. An. 114; *Addison vs. Bank,* 15 La. An. 529; *Succession of Dupy,* 4 La. An. 571; *Burbridge vs. Chinn,* 34 La. An. 681. Therefore, the property forming the subject-matter of the universal legacy became at once the property of Tulane, and as such exempt from taxation.

"Not so that part of the estate covered by the particular legacies. It became, in a sense, the property of the particular legatees, 'from the day of the testator's death.' (Civ. Code, Art. 1626.) It stood in the hands of the executor to be delivered, not to Tulane, but to the particular legatees. (Civ. Code, Art. 1630.) It had to be deducted from the estate before Tulane could take anything under the will. (Civ. Code, Art. 1634.) Indeed, not only did the ownership not pass to Tulane, but even the possession did not. The will did not provide that it should; and the laws expressly provided that, in case the executors were divested of the seizin by the universal legatee, there should be left in their hands 'a sum sufficient to pay the movable legacies.' (Civ. Code, Art. 1671.) Therefore, this fund formed no part of the property of Tulane, and was not exempt from taxation.

"The learned counsel for defendants contend that, pending the administration of the succession, the

ownership of the property is vested in the succession; and in support of that contention they cite the cases of *City vs. Stewart's Estate,* 28 La. An. 180; *State vs. Brown,* 32 La. An. 1020; *Carter vs. City,* 33 La. An. 816; and *Succession of Levy* (La.), 39 South. 37.

"If these decisions went counter to the doctrine expressed by the maxim, *'Le mort saisit le vif,'* whereby the ownership of the property is transmitted directly and immediately from the testator to the heir, *or to the universal legatee,* as the case may be, they would be in the teeth of the Code, and would simply have to be brushed aside. Far from it, they are to the contrary effect. Thus, in the case cited from 32 La. An. 1020 (*State vs. Brown*), the Court expressly says:

" 'The maxim, "Le mort saisit le vif," is expressly embodied in our Civil Code, and excludes the interposition of any temporary and qualified ownership, such as that of administrators, between the deceased and his heirs. (Civ. Code, Art. 940 *et seq.*)'

"These decisions do not mean to hold, and do not hold, that the abstract being called 'succession' is owner of the property in the sense of excluding, or *affecting in the slightest degree,* the ownership vested in the heir or the universal legatee. When these decisions speak of the succession being owner, they mean, as a matter of course, that it is holding for the true owner, and merely for the purposes of administration. Nothing that is said in them is intended to detract in the slightest degree from the recognized ownership of the heir *or of the universal legatee,* as the case may be, and from the substantial rights (such as that of exemption from taxation) flowing from such ownership."

* * * * * * * *

"So, Toulier (IV., 582) says: 'The seizin of the executor does not interfere with that of the heir of

blood, or of the universal legatee, in the case where the latter has seizin. It is always the heir who has veritable possession; he is alone seized as proprietor. The executor possesses only as depositary in the name of the heir, or universal legatee, who can put an end to the seizin by offering to turn over to the executor a sufficient amount to pay the movable legacies, or by giving a security for their payment, and that, even when the testator has charged the executor to sell all his property.'

"*The case of the Succession of Levy (La.), 39 Sou. Rep. 37, was decided from considerations peculiar to an inheritance tax, and which can have no application in the instant case.* This inheritance tax was held to be due notwithstanding that, under the provisions of the Code, the ownership of the property passed to the heirs. *The maxim 'Le mort saisit le vif' was expressly recognized.* A like recognition in the instant case would be decisive of the controversy, for the exemption extends (Const. 1898, Art. 255; Act No. 43, p. 52, of 1884, Section 5) to 'all the property of Tulane University of Louisiana of whatsoever character.' And the recognized purpose of the exemption is that the patrimony of Tulane shall not be diminished—not even to the extent of one cent—by the payment of taxes.

* * * * * * * *

"The learned counsel for defendant says that, differently from the relations between citizens, which are governed by private law, the relations between the State and the citizen are governed by public law, and that the principles of this public law are not to be found in the Code, but in the common law. The sole question in this case is as to the transmission of this property from the deceased to those who are to take it under the will, *and as to the tenure of the latter.*

"Now, since the transmission and tenure of property in this State is unquestionably governed by the Civil Code, we fail to see what relevancy the distinction between private and public law can have, or what application the common law can have."

III.

It being clearly shown, therefore, that, as to the universal legatees, the inheritance of property by them took place at the moment of their testator's death, it is clear that this privilege or right of inheritance was not exercised subsequently; and, there being no inheritance after the tax was levied, no tax is due. To impose a tax for such privilege of inherison, and then to make it retroact so as to apply it to those who have already inherited, and may even have disposed of their inheritances, though not yet in physical possession, is not taxation, but confiscation; is the imposition of a tax for a right of succession, where there is no longer the necessity for the exercise of such right; and is a charge by the State for no equivalent return.

In the language of Mr. Justice Provosty:

"To pass a law taxing such vested property as an inheritance, is not to impose a condition upon the right of inheritance, but is to undertake to tax as an inheritance something which is not such, which has ceased to be such."

Such a tax, so far as it is retroactively applied to divest this vested right, is the deprivation of property without due process of law.

IV.

It has been settled that, whatever the jurisprudence as to State legislation prior to the adoption of the Fourteenth Amendment, since its adoption the States are prohibited from enacting retroactive legislation that divests vested rights. The prohibition, that formerly applied, under the Fifth Amendment, only to the United States, now applies with equal force, under the Fourteenth Amendment, to the States. They, no more than the United States, can, under the guise of taxation, or other legislation, take private property for public purposes without compensation, or pass retroactive laws that divest vested rights, because of the prohibition that they shall not deprive persons of their property without due process of law.

For the complaint here is not that the law is merely retroactive. Remedial legislation that is retrospective is unobjectionable. Retroactive legislation that does not divest vested rights is not in violation of the Federal Constitution. But retroactive legislation that divests vested rights, that interferes with rights already acquired, that imposes a tax for the privilege of inherison where such privilege has been long since exercised, and, therefore, requires payment of such tax merely because it has the physical power to do so by reason of the fact that the owner is, from some delay or other accidental cause, not yet in possession, is a clear taking of property, a clear deprivation of property, without due process of law.

And, in this connection, it is well to quote the language of Judge Cooley in his work on Constitutional Limitations:

> "The chief restriction upon this class of legislation is that vested rights must not be disturbed; but, in its application as a shield of protection, the term 'vested rights' is not used in any narrow or technical sense, or as importing a power of legal control merely, but rather as implying a vested interest which it is right and equitable that the Government should recognize and protect, and of which the individual could not be deprived arbitrarily without injustice. The right to private property is a sacred right; not, as has been justly said, 'introduced as as the result of princes' edicts, concessions and charters, but it was the old fundamental law, springing from the original frame and constitution of the realm.' "
>
> **Cooley's Constitutional Limitations, Sixth Edition, Page 436.**

And in the cases cited by him, it is stated:

> "Rights of property, which have been created by the common law, cannot be taken away without due process; but *the law itself*, as a rule of conduct, may be changed at will, or even at the whim, of the Legislature, unless prevented by constitutional limitations."
>
> **Munn vs. Illinois, 94 U. S., 113, 134.**

And:

> "After property has once vested under the laws of descent, it cannot be divested by any change in those laws."
>
> **Norman vs. Heist, 5 W. and S. 171.**
>
> **Beall vs. Beall, 8 Ga. 210.**

The State has the undoubted right to charge a tax for the privilege of inheriting; but, after this right has been acquired under previously existing laws, to change those laws, so as to charge for a right already acquired and acted upon under those laws as they then existed, is to deprive one of property without due process of law.

If it can thus take away ten per cent., it can take away the whole; and property previously acquired under an existing state of laws, and held by the owners, or even alienated or incumbered, is thus, both as to the owners and the transferees or mortgagees, diminished in value by a tax alleged to be on a privilege of inheriting, which, however, has been previously exercised, and is no longer required to pass the title, or vest the right.

The possession does not enlarge the estate, any more than the possession enlarges the estate of the landlord, after the tenancy has ceased, or the coming of age and the acquisition of his property enlarges the estate of the minor. The charge is thus seen to be imposed solely on the occasion of some change in the relation of the owner to the property, which does not relate to a succession or inheritance. Yet the tax is not a tax on property, but on the right of succession. And this succession took place at the instant of death. *Le mort saisit le vif.* The dead seizes the living. xxx

In a number of cases in our own State the principle contended for was applied.

An inheritance tax of ten per cent. having been imposed in 1842, not only on alien heirs who were non-

xxx In re Seaman, 147 N.Y. 69, it was held that the possession which took place after the act, was not a transfer or a succession, then first occurring, and not the tax was not due.
So the same effect is Sue Dyon, 6 Rob. (La.) 504.

residents, but also on citizens of Louisiana residing abroad **(State vs. Poydras, 9 An. 165)**, a treaty was passed between the United States and France, on February 23, 1853, by which citizens of each country were exempted from any greater tax upon successions devolving to them than citizens of the country in which the succession was opened; and, in the case of **Sucession of Dufour, 10 An. 391**, it was held that, where a subject of France died August 14, 1853, his heirs could not be charged with the tax, because the rights of the heirs vested after the treaty went into effect.

This view was confirmed in **Succession of Amat, 18 An. 403**; and, likewise, as to Bavarian subjects, in **Succesion of Crusius, 19 An. 369.**

But in the **Succession of Prevost, 12 An. 577**, the Court held that the succession of a French citizen *who died before the treaty was made* was not exempt, and used the following language:

> "The present case, however, differs from that of *Dufour* in the essential particular that Prevost died many years before the conclusion of the consular convention with France, and the right of the State of Louisiana to this tax, consequently, attached at a period when French citizens did not enjoy an exemption from the operation of the Act of 1842. By the fiction of law, *Le mort saisis le vif*, the rights and obligations of the opponent, Jean Louis Prevost, as heir of François Marie Prevost, relate back to the death of the latter, which took place on the 18th of May, 1848."

And this decision was affirmed by the Supreme Court of the United States in **19 How. 1, 15 L. Ed. 572.**

So, in **Succession of Schaffer, 13 An. 113,** the treaty having become operative August 11, 1853, and Schaffer having died the July previous, it was held that the rights of the State to the ten per cent. tax had vested, and the heirs were held liable.

Similarly, with respect to an inheritance tax of Louisiana in 1828, which was repealed in 1850, a testator having died in the interim, the State was held entitled to the tax thereafter, as her rights had already vested at the date of the death.

Arnaud's Heirs vs. His Executors, 3 La. 336.

The same state of facts existed in **Guessart's Heirs vs. Canonge, 3 La. 560.**

To the same effect, as to the rights of the heirs, is **Succession of Dyon, 6 R. 504,** where the Court held the heirs not liable

> "When did the petitioners become entitled to the sums they claim? Surely, not in 1843, when they came forward to receive them, but in 1835, when the succession was opened by the death of their ancestor."

To the same effect is **Succession of Deyraud, 9 Rob. 357.**

The exact proposition for which we contend has been twice decided by the Court of Appeal of New York.

In the **Case of Pell, 171 N. Y. 48,** the testator, Walden Pell, First, died in the City of New York on April 14, 1863; and, by the terms of his will, gave a life estate in all his property to his widow, with remainders over at her death in equal shares (after making various bequests of personal property) to his nephews and nieces, and

the issue of any deceased nephew or niece, together with one equal share thereof to his sister, Emma. The life tenant, the widow, died on December 20, 1899, at which time all the estates in remainder came into the actual possession and enjoyment of the beneficiaries under the will and codicil. The Comptroller of the State of New York contended that the bequests of personal property and the estates upon remainder of real estate were subject to the payment of the transfer tax, under an amendment of the general statute, providing for taxable transfers (Laws 1899, Chap. 76), being Article 10 of an act in relation to taxation, constituting Chapter 24 of the General Laws (Laws 1896, Chap. 908, pp. 795, 868), which reads as follows:

> "All estates, upon remainder or reversion, which vested prior to June 30, 1885, but which will not come into actual possession or enjoyment of the person or corporation beneficially interested therein until after the passage of this act, shall be appraised and taxed as soon as the person or corporation beneficially interested therein shall be entitled to the actual possession or enjoyment thereof."

This amendment of 1899 became a law on March 14th of that year, the life tenant dying in the following December.

The constitutionality of the law was attacked, as the Courts say,

> "not because it is retroactive, but for the reason that it is both retroactive and effective to impair vested rights."

And the Court said:

> "Legislation which impairs the value of a vested estate is unconstitutional,"

citing *Germania Sav. Bank vs. Suspension Bridge,* 159 N. Y. 362, 54 N. E. 33; and that the tax should be restricted to subsequent successions, citing *In re Seaman,* 147 N. Y. 69, 41 N. E. 401.

And the Court, after stating that

> "expectant future estates, as defined in the statute, expressly include all remainders, whether vested or contingent; and they are by statute descendable, devisable and alienable,"

(citing *Moore vs. Littel,* 41 N. Y. 66, 84, Fearne on Contingent Remainders, p. 364, and *Kenyon vs. Lee,* 94 N. Y. 563, 568), proceeds to say:

> "This Court and the Supreme Court of the United States have held, in numerous cases, that the transfer tax is not imposed upon property, but upon the right of succession. *It, therefore, follows that, where there was a complete vesting of a residuary estate before the enactment of the transfer-tax statute, it cannot be reached by that form of taxation.* In the case before us it is an undisputed fact that these remainders had vested in 1863, and the only contingency leading to their divesting was the death of a remainderman in the lifetime of the life tenant, in which event the children of the one so dying would be substituted. *If these estates in remainder were vested prior to the enactment of the transfer-tax act, there could be in no legal sense a transfer of the property at the time of possession and enjoyment.* This being so, to impose a tax based on the succes-

sion would be to diminish the value of these vested estates, to impair the obligation of a contract, and take private property for public use without compensation.

"The learned Appellate Division reached the conclusion that this amendment of 1899 was unconstitutional, and we agree with them in that regard."

In Re Pell, 171 N. Y. 48, 57 L. R. A. 543.

For the reason that the remaindermen took from Walden Pell, First, in 1863, and not from his widow in December, 1899, their interests vested at the date of his death, though they came into possession only at hers. These rights, therefore, could not be subtracted from thereafter by a tax on the privilege of inheriting which had been exercised under existing laws many years before.

In the subsequent *Case of Lansing,* 182 N. Y. 238, the Court of Appeal of New York held that, even where there was a power of appointment granted under the will in 1869, if it were not exercised, the estate must be held to accrue under the first will from the first ancestor, and not the last; and that the rights of the beneficiaries which vested at the death of the testator in 1869 could not be subjected to a succession tax in 1899.

In that case the facts and the point decided are stated by the Court to be:

"1. TRANSFER ACT; EXERCISE OF A TESTAMENTARY POWER OF APPOINTMENT WHICH TRANSFERS NOTHING, NOT SUBJECT TO TAX—Under a will taking effect in 1869, by which the testator devised one-half of his residuary estate to trustees for each of his children

living at the time of his death, to hold the portion of each child in severalty, in trust during the life of such child, and after the death of such child her portion to go to her heirs at law, subject, however, to the power of such child to devise the remainder by will, in fee, to the heirs at law and collateral relatives of such child, in such proportion and manner, and with such limitations, as such child may desire to impose, the exercise of the power given by such will by a daughter who died in October, 1904, leaving a will dated April 25, 1892, whereby she devised her share of her father's estate held in trust for her benefit to her daughter in fee absolute, her only child and heir at law, and who was in being at the death of her grandfather in 1869, transfers nothing that was not given to her daughter by the will of her grandfather. At his death she took a vested interest in the remainder. Her rights were fixed by him, subject, however, to be defeated by the exercise of a power of appointment which changed them, not by one that left them precisely as they existed under his will; and, therefore, it must be regarded as a nullity. There was no transfer to her under the will of her mother, but under the will of her grandfather, and at that time there was no statute imposing a transfer tax. The imposition of such a tax, therefore, upon the theory that the trust property was transferred by the will of her mother, cannot be sustained, especially when she expressly disclaims deriving any title to such property under the power and elects to reject it from that source; and the fact that she accepts property belonging to her mother under her will does not prevent her from rejecting the title tendered by the appointment, although both the gift and the appointment are made by the same instrument.

"2. Failure to Exercise Power—A contention that the failure or omission to exercise a power of appointment subjects the property to a transfer tax

in the same manner as if the donee of the power had owned the property (L. 1897, Ch. 284, p. 220, Subd. 5) is without force. *Where there is no transfer there is no tax, and transfers made before the passage of the statute are not affected by it.*

"3. TRANSFERS PRIOR TO ENACTMENT OF STATUTE NOT AFFECTED—Assuming that the interest acquired under the grandfather's will was contingent, nevertheless, it was acquired at the instant of his death, and became a property right which could not be cut down by the subsequent imposition of a transfer tax."

And the Court, in discussing the case, say:

"We pass without serious discussion that part of the statute which provides, in substance, that the failure or omission to exercise a power of appointment subjects the property to a transfer tax in the same manner as if the donee of the power had owned the property and had devised it by will. (L. 1897, Ch. 284, p. 220, Subd. 5.) *Where there is no transfer there is no tax, and the transfer made before the passage of the act relating to taxable transfers is not affected by it,* because, as we held in the *Pell Case* such an act imposes no direct tax and is unconstitutional, since it diminishes the value of vested estates, impairs the obligation of contracts and takes private property for public use without compensation. (*Matter of Pell,* 171 N. Y. 48; *Matter of Delano,* 176 N. Y. 486, 495.)

"After the death of Mr. Suffern and the vesting of the remainder in Mrs. McVickar, *no statute could prevent her from entering into the full enjoyment of the property upon the death of Mrs. Lansing. The law sanctioned the gift of Mr. Suffern when it was made, and the law cannot cut down the gift by imposing a transfer tax when there was no transfer.*

"Even if her interest was contingent; nevertheless, as was said by Judge Cullen in a late case 'the interests of the devisee accrued on the death of the testator and at that instant, and were immune from legislative attack whether contingent or vested.' (*Matter of Vanderbilt*, 172 N. Y. 69, 73, citing *Brevoort vs. Grace*, 53 N. Y. 245.)

"It is not at all necessary to determine whether the remainder which Mrs. McVickar took under her grandfather's will was vested or contingent. If we assume that the remainder was contingent, nevertheless it was acquired by Mrs. McVickar under her grandfather's will at the instant of his death. It then became a property right in her which was just as sacred and just as immune from legislative attack as any other property right. (*Brevoort vs. Grace*, 53 N. Y. 245.) Of course, it is only for this purpose that that case is cited, no transfer tax having been enacted for many years after it was decided. It is true that Mrs. McVickar's estate was subject to be defeated by her death before her mother, or by diminution if her mother left other children, but her right to the estate if she survived her mother was indefeasible. I am at a loss to see what bearing the question of a remainder being vested or contingent has to do with the liability to the transfer tax when that remainder was created prior to the imposition of any transfer tax. The theory of a transfer tax is that it is a tax on the right accorded to take under a will or to succeed in case of intestacy which, it is said in the decisions, are privileges that may be accorded or denied by the State. (*Matter of Dows*, 167 N. Y. 227; *Magoun vs. Illinois Trust & Sav. Bank*, 170 U. S. 283.)

"This is the only theory on which the tax can be upheld; for it is imposed upon United States securities, on which, of course, the State cannot impose any property tax. Now, suppose that the State, at the

time it imposed the inheritance tax, instead of enacting that statute, had forbidden the making of wills and successions in case of intestacy, itself taking all the property that a decedent might leave at the time of his death, such a statute could have no possible effect on Mrs. McVickar's rights, for those rights had been acquired long before. *Therefore, what privilege did she get at that time from the State for which it can charge or impose a tax?* The ground on which the *Pell Case* proceeded was that a transfer tax could not be imposed on the acquisition of property where the acquisition had taken place prior to the enactment of the taxing statute. *The ground on which the Dows Case proceeded was that the legatees took under a power of appointment in a will made subsequent to the enactment of the Inheritance Tax Law, and that the State could impose a tax on property passing under that will.* It was strongly intimated, however, that had the power of appointment not been exercised, and the parties had taken under the will of their grandfather, the estate would not have been liable to the tax. The difference between my brother Haight and myself is that he maintains that Mrs. McVickar's rights accrued on the death of her mother, while I insist they accrued on the death of her grandfather. It is true that their value would have been destroyed by her death before that of her mother, but for her survival she is in no way indebted for any privilege accorded her by the State."

Pages 247 *et seq.*

The learned counsel for the defendants in error rely on the case of **Orr vs. Gilman, 183 U. S. 278,** as maintaining a contrary doctrine.

But a close examination of that case will not bear out their contention.

For, in that case, this Court, applying the law to the facts before it, merely held that where, under a will, there was granted a power of appointment, which power of appointment was exercised subsequent to the statute, and by virtue of which appointment the present legatee took, the privilege was exercised after the passage of the law and the tax was due. And this was the same view adopted by the Court of Appeal of New York when the case was before it under the title of "*Matter of Dows,* 167 N. Y. 227;" and is cited and differentiated, as above set forth, in line with the principles laid down by this Court in the *Lansing Case* quoted, 182 N. Y. 238.

Nor is the case cited by the learned counsel, of **Ferry vs. Campbell, 110 Iowa, 290, 81 N. W. 604,** in point, for, in that case, the Court decided merely that a remedial statute, providing for notice of assessment under the law already in existence, did not divest vested rights and was not unconstitutional.

Furthermore, Deemer, Justice, as organ of the Court, said:

> "Appellee's counsel say, however, that the estate vested on the death of the testator, and that any change made thereon by the Legislature after his death is unconstitutional and void. As to real estate this is true, perhaps, although it is best that we do not decide the point on the arguments before us."

The Court, in remanding the case, further said:

> "It may be no tax can be collected on the real estate. On that point we express no opinion."

This case, then, far from militating against the position we have taken, sustains the point we are contending for—that, where an estate passes and vests on the death of the testator, as it does under the laws of the State of Louisiana, any change made therein by the Legislature, after the estate is so vested, is unconstitutional.

The case of **Carpenter vs. Com., 17 Howard, 456,** involved the construction of a Pennsylvania statute, in which the rights of the heir were expressly stated to be

> "subordinate to the conditions, formalities, and administrative control prescribed by the State in the interests of its public order, and are only irrevocably established upon its abdication of this control at the period of distribution."

However applicable to the case in hand under the system of law of the State of Pennsylvania, it is resepctfully submitted that it has no application to the present case, where, as has been shown, the rights of the universal legatees are not subordinated to the conditions for administrative control, and do not depend for their establishment on the period of distribution.

Besides, that case was decided prior to the Fourteenth Amendment, when there was no prohibition against the States passing retroactive legislation divesting vested rights.

Certainly, the case of *Orr vs. Gilman*, decided by this Court, does not hold that, in the face of the Fourteenth Amendment, such a tax can be retroactively imposed, because, there was no retroactive legislation involved;

that case, under the facts before it, merely deciding that, where the power of appointment under which the present heir took was exercised subsequent to the passage of the act, the tax was due.

And this Court stated, in that case, that it must adopt, as a basis of its decision, the opinion of the Court of Appeal of New York—that the property had not vested under the prior will, but only under the power of appointment—saying:

> "We here meet, in the first place, the question of the construction of the will of David Dows, Sr. Under and by virtue of that will did the property whose transfer is taxed pass to and become vested in the grandchildren, or did the property not become vested in them until and by virtue of the will of David Dows, Jr., exercising the power of appointment? The answer to be given to this question must, of course, be that furnished us by the Court of Appeals in this case. (*Re Dows*, 167 N. Y. 227, 52 L. R. A. 433, 60 N. E. 439.)"

And this Court adopted the finding of that Court, that,

> "whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied; that, in reality and substance, it is the execution of the power that gives to the grantee the property passing under it,"

and affirmed the decision of the Court of New York.

Now, when the question came up before the same Court, in the *Pell Case* (171 N. Y. 48), and in the *Lansing Case* (182 N. Y. 238), in which no such power of appointment

was exercised, the distinguished counsel for the Comptroller of the State of New York relied on the case of *Orr vs. Gilman,* as sustaining a different view, as the Court will see from his brief, given in full in volume 57 of the Lawyers' Reports Annotated, page 541, and yet the Court distinguished the cases, and held that, where the power of appointment was not exercised, the right of the heir accrued under the original will and vested at the death of the original testator, and could not be denied by subsequent legislation.

These decisions of *Pell* and of *Lansing* were clearly correct and apply both to the universal and particular legatees in the present case.

How much stronger is the case at bar, as respects the universal legatees, where, under the Louisiana law, their rights vested at the date of the death of their testator before they took any steps to put themselves in possession, existed independently of the fact of possession, subordinate to no right of administrative control whatever, dependent upon no judgment of recognition, beyond, possibly, the mere probate of the will, which itself was long prior to the passage of the act imposing the tax, and related back to the date of the death of the testator, and which, therefore, in the language of Justice Provosty had become property, and was no longer an inheritance!

Here the right was complete at the moment of death. And this right was complete and in no wise depended on the remedies existing and provided for its enforcement. No more than the landlord coming into possession of the

property of which he was already owner could be taxed for the right of acquisition or ownership merely because the general laws afforded him remedies for the enforcement of his right. The rights of these heirs had already been acquired and were complete under the law independent of the remedies the law afforded for their subsequent enforcement. Their right of ownership no more depended on the remedies provided by law than the other rights of property of other citizens. Indeed, their rights had become property, and were no longer inheritances to be acquired under the law, and the State, therefore, had no right to claim a portion of the estate already inherited for the privilege of acquiring.

If the State could demand one-tenth for the privilege of inheriting the other nine-tenths, she could demand more; and so she might demand all. And consequently, under the guise of a tax on the right to inherit, she could take the property already inherited. This, it is submitted, is not taxation, but confiscation. It is the taking of private property for public purposes without compensation, the divesting by retroactive legislation of vested rights, and a deprivation of property without due process of law, prohibited to the States, as this Court has held, since the adoption of the Fourteenth Amendment.

This was decided in the notable case of **Chicago, Burlington & Quincy R. R. Co. vs. Chicago, 166 U. S. 226, 41 L. Ed. 979,** in which this Court said:

> "In our opinion, a judgment of a State Court, even if it be authorized by statute, whereby private prop-

erty is taken for the State, or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest Court of the State is a denial by that State of a right secured to th eowner by that instrument."

And the Court further said:

"In *Davidson vs. New Orleans*, above cited, it was said that a statute declaring in terms, without more, that the full and exclusive title to a described piece of land belonging to one person should be and is hereby vested in another person, would, if effectual, deprive the former of his property without due process of law, within the meaning of the Fourteenth Amendment. See, also, *Missouri P. R. Co. vs. Nebraska Board of Transportation*, 164 U. S. 403, 417 (*ante*, 489, 495). Such an enactment would not receive judicial sanction in any country having a written Constitution distributing the powers of government among three co-ordinate departments, and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such Constitution. It would be treated not as an exertion of legislative power, but as a sentence, an act of spoliation. Due protection of the rights of property has been regarded as a vital principle of republican institutions. 'Next in degree to the right of personal liberty,' Mr. Broom in his work on Constitutional Law says: 'is that of enjoying private property without undue interference or molestation.' (Page 228.) The requirement that the property shall not be taken for public use without just compensation is but 'an affirmance of a great doctrine established by the common law for the protection of private property. It

is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.' (2 Story, Const. Sec. 1790; 1 Bl. Com. 138, 139; Cooley, Const. Lim. 559; *People vs. Platt*, 17 Johns. 195, 215 [8 Am. Dec. 382]; *Bradshaw vs. Rogers*, 20 Johns. 103, 106; *Mount Washington Road Co.'s Petition*, 35 N. H. 134, 142; *Parham vs. Decatur County Justices of Inferior Court*, 9 Ga. 341, 348; *Ex parte Martin*, 13 Ark. 199, 206 *et seq.*; *Johnston vs. Rankin*, 70 N. C. 550, 555.)"

And the Court cited the decision of Mr. Justice Jackson to the same effect:

"In *Scott vs. Toledo*, 36 Fed. Rep. 385, 395, 396 (1 L. R. A. 688), the late Mr. Justice Jackson, while Circuit Judge, had occasion to consider this question. After full consideration, that able Judge said: 'Whatever may have been the power of the States on this subject prior to the adoption of the Fourteenth Amendment to the Constitution, it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the States cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner; and that any attempt so to do, whether done in pursuance of a constitutional provision or a legislative enactment, whether done by the Legislature itself, or under delegated authority by one of the subordinate agencies of the State, and whether done directly, by taking the property of one person and vesting it in another, or the public, or indirectly, through the forms of law, by appropriating the property and requiring

the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that "that due process of law" required by said amendment. The conclusion of the Court on this question is that, since the adoption of the Fourteenth Amendment, compensation for private property taken for public use constitutes an essential element in "due process of law," and that, without such compensation, the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the Federal Constitution.' To the same effect are *Henderson vs. Central Pass R. Co.*, 21 Fed. Rep. 359, and *Baker vs. Norwood*, 74 Fed. Rep. 997."

To the same effect is **Professor McGeehee** in his late work on **Due Process of Law (1906)**:

"To bring an enactment within this clause and render it obnoxious to due process of law, it is not sufficient that the law changes previously-existing rules—that is, that it is retroactive or retrospective in the widest sense. Before the passage of the Fourteenth Amendment, as has been seen, the power of the States to enact retroactive laws not *ex post facto* nor impairing the obligation of contracts was well settled, even though such laws might divest antecedent vested rights of property. But one effect of the amendment, although it does not prohibit retroactive laws as such, and, therefore, such laws are still permissible, was to prohibit all merely arbitrary interference with fundamental rights, and among those rights are vested rights of property, without regard to the source, contractual or otherwise, by which they became vested."

McGehee's Due Process of Law, page 155.

Nor can it be said that the power of taxation is not limited by this same power.

If, as we contend, there is no longer an inheritance, there can be no inheritance tax, for, as this Court has held, there must be a corresponding benefit—a something for which the tax is charged—else it is not taxation, but extortion.

As said in the late case of **Union Refrigerator Transit Co. vs. Kentucky, 199 U. S. 194:**

> "The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation or maintenance of public conveniences in which he shares—such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe allegiance, and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this Court to be beyond the power of the Legislature, and a taking of property without due process of law. (*Northern C. R. Co. vs. Jackson*, 7 Wall. 262, 19 L. Ed. 88; *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 21 L. Ed. 179; *Tappan vs. Merchants' Nat. Bank*, 19 Wall. 490-499, 22 L. Ed. 189-193; *Delaware, L. & W. R. Co. vs. Pennsylvania*, 198 U. S. 341, 358, 49 L. Ed. 1077, 1083, 25 Sup. Ct. Rep. 669.) In *Chicago, B. & Q. R. Co. vs. Chicago*, 166 U. S. 226, 41 L. Ed. 979,

17 Sup. Ct. Rep. 581, it was held, after full consideration, that the taking of private property without compensation was a denial of due process within the Fourteenth Amendment. (See, also, *Davidson vs. New Orleans,* 96 U. S. 97, 102, 24 L. Ed. 616, 618; *Missouri P. R. Co. vs. Nebraska,* 164 U. S. 403, 417, 41 L. Ed. 489, 495, 17 Sup. Ct. Rep. 130; *Mount Hope Cemetery vs. Boston,* 158 Mass. 509, 519, 35 Am. St. Rep. 515, 33 N. E. 695.)"

So, **Prof. McGehee,** in his work on **Due Process of Law,** says:

"As extensive as the power is to tax, its exercise is subject to well-established limitations. Special restraints in the Constitution upon the taxing power must, of course, be observed; but, besides these, there are other and more general limitations arising from the nature of our Government, and from fundamental principles of justice, embodied in the conception of 'due process of law'."

McGehee's Due Process of Law, page 215.

This limitation is likewise clearly stated by **Mr. Cooley** in his work on **Taxation.**

The power to tax cannot be used in violation of the rights of property acquired under the existing laws. To do so is a deprivation of property without due process of law.

Furthermore, we call the Court's attention to this fact—that the act imposing this inheritance tax nowhere provides for notice to those interested, or opportunity to be heard in the fixing of the value of the property on which the tax is to be levied.

As said by **Judge Cooley** in his work on **Taxation, at pages 255-256:**

> "It is not to be presumed that constitutional provisions, carefully framed for the protection of property, were intended or could be construed to sanction legislation under which officers might strictly assess one for any amount in their discretion, without giving an opportunity to contest the justice of the assessment. When the assessment is based upon value or benefits, whether it be a tax upon property or succession tax, that value is to be ascertained by appraisement, assessors, or other tribunal, which involves inquiry, notice and opportunity for hearing are essential to the validity of the proceedings."
>
> **Hagar vs. Reclamation District, 111 U. S. 701.**
> **Stuart vs. Palmer, 74 N. Y. 183.**

As said **In Re McPherson, 104 N. Y. 321,** by the Court of Appeal of New York:

> "This tax is imposed according to the value of the legacy and collateral inheritance liable to be taxed, and, hence, there must be some method of ascertaining that value; and, for that purpose, judicial action is requisite at some stage of the proceeding before the liability of the taxpayer becomes finally fixed. He must have some kind of notice of the proceedings against him, and a hearing or an opportunity to be heard, in reference to the value of his property, and the amount of the tax which is thus to be imposed. Unless he has this, his constitutional right to due process of law has been invaded."

This was the exact point decided in **Ferry vs. Campbell, 110 Iowa, 290, 81 N. W. 604,** which held that the original

law was void for want of provision for notice and which was subsequently cured by remedial legislation providing for notice and opportunity to be heard on the appraisement.

We, therefore, submit with confidence, both on authority and on principle, that, as an inheritance tax is a tax on the right of succession, and not a tax on property; that, as the rights of these legatees and heirs vested long prior to the passage of the act imposing an inheritance tax, no such right of succession was thereafter exercised by them, that can be charged for or taxed by the State; and, further, as no notice is provided for to those interested in the property, on which the inheritance tax is to be paid, the exaction of such tax against these heirs and legatees is a deprivation of property without due process of law.

The Supreme Court of Louisiana, in their decision, say, as to the tax on the inheritance of these heirs:

> "It was property within the limits of the State, which the State could tax, for the purpose mentioned, until it had passed out of the succession of the testator."

It is submitted that the error of this statement lies in the fact that the learned Justice here confused the tax on the right to inherit with a tax on property. True, the property was still within the State, but it was not true that the right of inheritance or succession remained yet to be exercised.

In conclusion, we beg leave to add that the decision of this case is fraught with great moment to many persons who have long since inherited large estates, and have not yet come into possession. Such, for example, are the cases of minors, who inherited many years ago, but who have not yet come into possession. For the State now to impose a tax on their inheritance is clearly a deprivation of property without due process of law.

V.

We finally submit that the clause in question is a denial of the equal protection of the laws.

The Supreme Court of Louisiana says as to this:

> "The inequality and un-uniformity of the tax presents a serious question, for, in a republican form of government, all stand or should stand equal before the law, and entitled to its equal protection, and any exaction which savors of un-uniformity and inequality at once awakens attention."

Now, so far as the tax discriminates between descendants and collaterals, there is no objection. This was expressly decided in the **Magoun case.**

But the complaint is here, that, after having first made a class of descendants, it taxes some and exempts others; that, having made a class of collaterals or strangers, it taxes some and exempts others—and these, too, inheriting under the same conditions, by the same title, on the same day.

This is not classification, and is a denial of the equal protection of the laws.

In other words, the legatees under this will are subjected to the tax, because through the accident of delay or other cause they have not received possession of their property; yet the law says that other collaterals who have inherited by the same title at the same time, and are, therefore, similarly situated, are not required to pay. Not only is this the carving of a class out of a class on no just basis of selection, but it is almost equivalent to selecting the individuals required to pay by name and subjecting them to a tax.

A classification which makes certain heirs pay the inheritance tax and permits other heirs in the same general class to escape the payment thereof, when both sets of heirs' rights become fixed and vested on the same day, solely because in one instance the succession is closed and the other is not finally closed, does not rest upon a difference which bears a reasonable and just relation to the act in respect to which the classification is proposed. It is an arbitrary discrimination without such basis.

The closing of the succession cannot affect the question as to when the rights of the heirs vested; and cannot be a cause for differentiation among the heirs; and such a classification is purely arbitrary. Besides, such a classification rests on the theory that the tax is one on property, when, in fact, it is one on the right of inheritance.

Indeed, this precise point is decided in the **Pell case,** previously referred to, **171 N. Y. 48, 57 L. R. A. 544-545,** in which the Court of Appeal of New York says:

> "It is the undoubted rule that the Legislature possesses unlimited power of taxation, except as restrained by constitutional provisions. These restraints require the taxation to be imposed according to well-settled general rules. In *Pollock vs. Farmers' Loan & T. Co.,* 157 U. S. 599, 39 L. Ed. 825, 15 Sup. Ct. Rep. 696, the Supreme Court of the United States lays down the following rule: 'The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax.' Mr. Cooley, in his work on Taxation, at page 596 (2d Ed., p. 215), says: 'It is difficult to conceive of a justifiable exemption law which should select single individuals or corporations, or single articles of property, and, taking them out of the class to which they belong, make them the subject of capricious legislative favor. Such favoritism could make no pretense to equality. It would lack the semblance of legitimate tax legislation.' The Supreme Court of the United States, in a recent case, decided March 10, 1902 (*Connolly vs. Union Sewer Pipe Co.,* 184 U. S. 540, 46 L. Ed. 679, 22 Sup. Ct. Rep. 431), have considered the subject of classification very fully. The Court says: 'The difficulty is not met by saying that, generally speaking, the State, when enacting laws, may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects. For this Court has held that classification "must always rest upon some difference which bears a reasonable and just

relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis. * * * But, arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection." *(Gulf, C. & St. F. R. Co. vs. Ellis* 165 U. S. 150, 155, 159, 160, 165, 41 L. Ed 666, 668, 670, 671, 17 Sup. Ct. Rep. 255.) These principles were recognized and applied in *Cotting vs. Kansas City Stock Yards Co.*, 183 U. S. 79, *sub nom. Cotting vs. Godard* 46 L. Ed. 92, 22 Sup. Ct. Rep. 30, in which it was unanimously agreed that a statute of Kansas regulating the charges of a particular stock yard company in the State, but which exempted certain stock yards from its operation, was repugnant to the Fourteenth Amendment, in that it denied to that company the equal protection of the laws.' The case from which we have quoted above, involved the validity of the Illinois trust statute of 1893, which was alleged to be in violation of the Fourteenth Amendment of the Constitution of the United States. The act was held unconstitutional for the reason that the first section thereof embraced all persons, firms, corporations or associations of persons who combine their capital,

skill or acts for any of the purposes specified, while the ninth section declares that the statute shall not apply to agriculturist or live-stock dealers, in respect of their products or stock on hand. This discrimination was held to render the statute invalid.

"It is to be observed that the amendment of 1899, now under consideration, was further amended in 1900 and 1901, by changing the words 'June 30th, 1885,' to 'May 1st, 1892.' While these changes do not affect the case at bar, still they indicate the legislative intention to narrow the application of this statute to a very limited number of individuals belonging to a larger class. The vice of this legislation is that it does not seek to impose a tax on all estates upon remainder, whether created by will or deed, that vested prior to June 30, 1885, but contains the further provision that the life estate must expire after the passage of the amendment on March 14, 1899. All the vested estates upon remainder or reversion, as to which the intermediate life estate terminated between June 30, 1885, and March 14, 1899, escape taxation, as they are not within the purview of the amendment of the latter year. The tax is, therefore, imposed upon a limited class of remaindermen, while others who have come into possession and enjoyment by reason of the termination of the life estate long after the early date fixed of June 30, 1885, are not taxed. The learned counsel for the appellant states a very apt illustration in his brief, as follows: 'We often hear it declared that the Legislature may designate watches and carriages as a class of property, and subject the same to the payment of duties or taxes; but would any one claim that a law declaring that all watches or carriages which were purchased to June 30, 1885, should be appraised and taxed, could be sustained upon the ground that such law merely designated a class of property for

taxation?' Where the statute declares that the owners of a particular class of property, acquired at a particular time, shall be taxed, *it is equivalent to naming the owners of such property. It is in no sense a general classification.* The principle involved in this mode of taxation is illusedated in *In Re Henneberger,* 155 N. Y. 420, 42 L. R. A. 132, 50 N. E. 61, which involved the question whether a statute was a general or a private or local bill. The headnote reads as follows: 'Although an act is drawn in general terms, if its provisions are such, in number and in character, as unduly, with reference to the constitutional purpose, to restrict its operation, and, to all intents, to confine it to a particular locality, it comes as much under condemnation as a local bill, as though it designated the locality by name.' "

Now, in the case at bar, we submit that the constituents in each class are not affected alike, in so far as the Act 45 of 1904 authorizes the collection of the tax upon *all successions not finally closed* when the act was passed, as the effect of collecting the inheritance tax from the successions not finally closed on June 28, 1904, the date when Act No. 45 of 1904 became a law, is to make certain fathers, mothers, children, collateral relatives and strangers pay the tax, while permitting other fathers, mothers, children, collateral relatives and strangers whose rights accrued and vested at the same time escape. For illustration, suppose A and B, the fathers of families, had died on May 1, 1904, leaving estates, the net amount of which was equal in value. In A's estate the heirs closed the succession at once and

took possesion. On the other hand delays occurred in respect to B's succession, in consequence of which the succession was not finally closed when Act 45 of 1904 was passed. The result would be that the children of A would escape the tax, while the children of B would have to pay it. In view of the fact that both fathers died on the same day, and both sets of children inherited the same amount, and by the same kind of title, how can it possibly be said that the constituents of this general class of persons are affected alike or that the law operates equally and uniformly upon all persons? And this applies with equal force to collateral relatives, children and strangers.

The rule expressed by this Court in **Railroad Co. vs. Ellis, 165 U. S. 150,** is that the difference between the classes must "bear a just and proper relation to the attempted classification"; in **Barbier vs. Connolly, 113 U. S. 27-31,** that "equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights"; and in **Cotting vs. Kansas City Stock Yards, 183 U. S. 108,** that "equal protection of the laws means equal exemption with others of the same class from all charges and burdens of every kind."

This court said in the case of **Gulf, Colorado & Santa Fe R. R. Co. vs. Ellis, 165 U. S. 150-169,** that "arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this."

As said by **Mr. Cooley**, in his work on **Constitutional Limitations, p. 355:**

> "The law cannot be arbitrary, even though impartial."

As Justice Matthews said in the case of **Yick Wo vs. Hopkins, 118 U. S. 356-369**, the guaranty of the equal protection of the law, is "a pledge of the protection of equal laws."

If it be true that "equality is the very essence of the taxing power itself," how can the taxing of one heir for the privilege of inherison be legal, when another heir similarly situated, exercising the same privilege on the same day—is by an arbitrary discrimination exempted from the payment of the tax?

As said by District Judge Clark in **85 F. 302 (R. R. & Tel. Co. vs. Board of Equalizers:**

> "An unequal and unjust exaction is no longer a tax, but confiscation."

The inheritance tax is imposed on the right of succession. This right is granted by the State and is exercised at the very moment of the testator's death. Yet of two persons inheriting on the same day by the same kind of title, and who are therefore similarly situated, one under this law is taxed and the other escapes.

One is fortunate enough to "have his succession closed" while the other for some accidental or uncontrollable reason is heir in a succession not closed. Surely this is no just ground of discrimination.

After all classification is a judicial question, **Smyth vs. Ames, 169 U. S. 466, 526)**, and the Court must decide whether the attempted classification is equal, though not necessarily uniform.

As Mr. Justice Harlan said in the **Connelly case, 184 U. S. 540:**

> "What may be regarded as a denial of the equal protection of the laws is a question not always easily determined, as the decisions of this Court and of the highest Courts of the States will show. It is sometimes difficult to show that a State enactment, having a source in a power not controverted, infringes rights protected by the National Constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guarantee of the equal protection of the law means '*that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances.*' (*Missouri vs. Lewis*, 101 U. S. 22-31.)"

In the present case, the Honorable Supreme Court of Louisiana itself says:

> "At first blush it does appear that it is scarcely just to tax successions opened since said time and not yet closed, and not tax those that have been opened and closed in that time."

It is respectfully submitted that it is not only not just, but it is unequal, and in violation of the Fourteenth Amendment of the Constitution of the United States, and

that for this additional reason the law should be as to inheritances already acquired declared unconstitutional, null and void.

We, therefore, respectfully pray that the judgment be reversed, and that these heirs and legatees be decreed not liable to payment of the inheritance tax imposed by Act 45 of 1904, of the General Assembly of Louisiana.

Respectfully submitted,

GUSTAVE LEMLE,
CHARLES ROSEN,
Attorneys for Plaintiffs in Error.

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 91.

MRS. CAMILLE CAPEN, MRS. JULIA KAHN, EVA CAPEN, ET ALS., PLAINTIFFS IN ERROR,

vs.

JOHN BREWSTER, TAX COLLECTOR FOR THE SECOND DISTRICT OF THE CITY OF NEW ORLEANS, STATE OF LOUISIANA, AND ANDREW H. WILSON, PRESIDENT SCHOOL BOARD OF THE CITY OF NEW ORLEANS, STATE OF LOUISIANA.

Error to the Supreme Court of Louisian a.

BRIEF FOR DEFENDANTS IN ERROR.

Statement of Evidence and Pleadings.

For the purpose of avoiding, as far as practicable, a multiplicity of quotations and citations from the transcript, we condense the statement of facts and pleadings contained for the most part in the petition for the writ of error to the Supreme Court of Louisiana (Trans., pp. 43, 44, 45, 46, and 47), which is correct, with a single error as to the date of the death of the testator, viz.,

Mathias Levy, a resident of the city of New Orleans, died on the 26th of May, 1804 (not on the 30th); that his will, which left his property situate in New Orleans to his collaterals, as universal and special legatees, was duly ordered to be probated, registered, and executed on the 30th day of May, 1904, in the Civil District Court for the parish of Orleans, La. Subsequently the president of the school board and the tax collector, defendants in error, here became parties to the succession proceedings, claiming an inheritance tax of 10 per cent. (10%) on the amount of the property of the succession then in course of administration, under the Louisiana statute No. 45, of 1904, approved June 28, 1904, promulgated July 9, 1904, and operative in New Orleans July 30, 1904 (Trans., pp. 47, 17, and 18). To this demand of defendants in error, plaintiffs in error, answered (Trans., p. 18), denying said claim, on the following grounds:

First. That $10,000 of the property were in U. S. bonds, and as such not liable to the inheritance tax.

Second. That act No. 45, of 1904, was null and void, as being retroactive and divesting vested rights, in violation of the articles 31 and 225 of the constitution of the State of Louisiana, because the tax was not equal and uniform and did not express its object in the title, and was vague and uncertain, and did not define what is meant by "just proportion" borne by the property donated or inherited, and that the claim for the inheritance tax came too late, as the final account and tableau of distribution had been already ~~promulgated~~ homologated and was final when the tax was claimed.

Third. That said act 45, of 1905, was null and void, as it was unconstitutional, being in violation of Article one (1), Section nine (9), and the fifth and fourteenth amendments of the Constitution of the United States.

After trial on these issues, his honor of the District Court rendered judgment (Trans., p. 27) sustaining the claim of defendants in error to the tax excepting therefrom, however, the real estate, the U. S. bonds and the donations to the charitable and religious institutions, and gave written reasons for the judgment (Trans., pp., 20, 21, 22 and 23). Subsequently on an application for a new trial (Trans., p. 23), his honor gave judgment (p. 27) amending his former judgment and decreeing the inheritance collectible on all "the bonds securities," &c. The able opinion gives the reasons for judgment (Trans., 27, 28 and 29). The judge, however, refused the claim of the attorney for the tax collector for 10 per cent. on the amount of the tax, as provided for under the ordinary general Revenue Act of the State. From this judgment and decree, plaintiffs in error took an appeal to the Supreme Court of Louisiana (Trans., p. 35). The case was consolidated with a similar case in the Supreme Court (Succession of Samuel Arthur Kohn, No. 15,629), and these two cases were argued together at the same time on April 29, 1905. However, we have no concern here with the Kohn case, in which the claim for the inheritance tax was sustained, as the executor of Kohn acquiesced in the judgment and decree, and paid the tax. After argument in the Louisiana Supreme Court, that court rendered judgment, in an able opinion, affirming

the judgment of the lower District Court in the case at bar but amended it by ordering the debts of the succession to be deducted from the gross amount of the property of the succession, in adjusting the inheritance tax (Trans., pp. 35 and 36). The opinion is somewhat lengthy, and, discusses the various points raised by plaintiff in error refuting and negativing them all, and is on pp. 36, 37, 38, 39, 40 and 41 Trans., and cites full authorities in support of the decision. An application for rehearing by plaintiffs in error was filed, as well as an application by defendant in error, to amend the judgment and decree, both of which applications were refused (Trans., pp. 41 and 42.)

From this judgment and decree the present writ of error was taken to this Honorable Court (Trans., pp. 43–47) by the plaintiffs in error.

ARGUMENT.

The Louisiana Constitution of 1898 provides :

> " Art. 235. ' The Legislature shall have power to levy, solely for the support of the public schools, a tax upon all inheritances, legacies, and donations ; provided no direct inheritance or donation, to an ascendant or descendant, below ten thousand dollars in amount of value, shall be so taxed, provided further, that no such tax shall exceed 3 per cent. for direct inheritances and donations to ascendants or descendants, and 10 per cent. for collateral inheritances, and donations to collaterals or strangers; provided bequests to educational, religious or charitable institutions shall be exempt from this tax.
>
> "Art. 236. 'The tax provided for in the preceding article shall not be enforced when the property do-

nated or inherited shall have borne its just proprotion of taxes prior to the time of such donation or inheritance.'"

Act 45 of the Louisiana General Assembly of 1904 (pp. 102 and 103), entitled "An act to carry into effect Articles 235 and 236 of the Constitution of 1898 relative to inheritance taxes," approved June 28, 1904, became operative in New Orleans on July 30, 1904.

This act follows the verbiage of the two articles of the Constitution almost in *totidem verbis* in the first section of the law, except in the final clause in that section, which reads, "THIS TAX TO BE COLLECTED ON ALL SUCCESSIONS NOT FINALLY CLOSED AND ADMINISTERED UPON, AND ON ALL SUCCESSIONS HEREAFTER OPENED."

We capitalize this clause as we anticipate that the single issue in this cause, now before your honors, will turn on its constitutionality *vel non* under the Constitution of the United States. We so merely anticipate, inasmuch as no brief for plaintiffs in error has as yet been filed in this honorable Court, nor furnished to us, at the time of the writing of this brief.

In the courts of Louisiana, on the trial of this cause, both in the District and Supreme Courts, little or no stress was laid by opposing counsel, either in their briefs or oral argument, on the violation, or contravention, of the articles of the Constitution of the United States, which is now made the basis of this writ of error.

Although their written pleadings propound the alleged violations of the Federal organic instrument, counsel for plaintiffs in error did not discuss that question in

the Louisiana courts, but confined their argument almost solely to the violation of the articles of the Louisiana Constitution and the application of the law and jurisprudence of Louisiana thereunto.

In neither of the opinions of the District Judge (pp. 20, 21, 22, 23, 27, 28, and 29), nor that of the Supreme Court of Louisiana (Trans., pp. 36, 37, 38, 39 and 40) do those eminent jurists discuss or advert to the alleged repugnances of the statute to the articles and amendments of the United States Constitution.

The whole argument and discussion in these courts turned on the provisions of the Louisiana Constitution and the laws and jurisprudence of that State. The highest tribunal of that commonwealth having decided that there was nothing in the statute in contravention to the State organic instrument or its system of jurisprudence and laws, we take it that this honorable Court will not go behind or review the judgment and decision on those points.

> "The decisions of the highest court of a State that an act of the legislature is not in conflict with the provisions of the State constitution are conclusive on the Federal courts, except where the Federal Constitution and laws are concerned."
>
> Encyc. of Pleading and Practice, Vol. 22, p. 326.

So uniformly has this honorable Court maintained this doctrine that we feel that we need not cite authorities to sustain this text. If any were needed the same work cites nearly four score decisions to that effect in note 3 to the above text, in some of which this honor-

able Court adhered to this doctrine, although disagreeing with the State court.

This practically eliminates entirely any discussion here of the points (1) one and (2) two advanced by our opponents, as we have condensed them in the foregoing "Statement of Evidence and Pleadings," and narrows down the argument here to the (3d) third and only point to be considered, viz., "that said act of 1904 was null and void and was unconstitutional, being in violation of Article (1) one, Section (9) nine, and the Fifth and Fourteenth Amendments to the Constitution of the United States." On this point alone would this honorable Court have jurisdiction.

Although in their pleadings counsel for plaintiffs in error contend that the Louisiana statute is in violation of Article (1) one, Section (9) nine of the Constitution of the United States (p. 16, Trans.), there is obvious error in the number of the section, as it should be Article (1) one, Section (10) ten, instead of Section (9) nine, the Section (10) ten reading:

> "No State shall * * * pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts * * * ."

Our opponents also contend that the Louisiana Act 45 of 1904 is repugnant to the fifth amendment to the U. S. Constitution, the clause in which reads: "No person shall be * * * deprived of life, liberty, or property without due process of law."

The contention of our opponents came up for adjudication in this honorable court as early as 1854, in 17

Howard, 456 (Carpenter *et al.* vs. Commonwealth of Pa.), and was decided adversely to their present claim. In that case the facts were: "In 1849 a citizen of Pennsylvania died, whose will was proven by a resident in December, 1849." The Court decided that "It is true that in some respects the rights of donees under a will become vested by the death of a testator; but *until the period of distribution arrives, the law of the decedent's domicile attaches to the property.*" (Syllabus, p. 456.) (The italics are own.) The inheritance tax therein contested was under the statute of Pennsylvania of 1826, and another explanatory act of 1850, the latter act having been passed March 11, 1850, the year after the testator's death, and his will had been probated in 1849. It was urged by plaintiffs in error in argument that the Act of 1850 was retroactive, *ex post facto*, and impaired the obligation of a contract (Points for plaintiff in error, pp. 456-460), in violation of the 10th section of article 1 of the Federal Constitution. This honorable court, through Mr. Associate Justice Campbell, as the organ of the Court, decided against the plaintiffs in error, the executors, saying (p. 462):

> "The court has no authority to revise the act of Pennsylvania upon any ground of justice, policy, or consistency to its own constitution. These are concluded by the decision of the public authorities of the State. The only inquiry for this court is, does the act violate the Constitution of the United States?"

And at the end of the following paragraph continues (p. 46):

> "If the State, during this period of administration and control by its tribunals and their appointees, thinks fit to impose a tax upon the property, there is no obstacle in the Constitution and laws of the United States to prevent it. (Ennis *vs.* Smith, 14 How., 400; In *re* Erwin, 1 Cr. and Jer., 151; 1 Barb. Ch., R., 180; 6 W. H. & G. C'y, R., 217; 21 Com'r, R., 577."

And affirmed the decision of the Pennsylvania Supreme Court sustaining the inheritance tax under the Pennsylvania statute of 1850, although the act was passed nearly three months after the death of the testator and the probating of his will. This case is cited with approval in 17 Wall., 206; 7 Otto, 384; 1 Abb. U. S., 115; McAll, 221; 10 Bank Reg., 464; 10 Biss., 416, 449, 450, according to note in 15 Law Edict, p. 129. It is also discussed at length and approved in Orr *vs.* Gilman and Color, 183 U. S., 278, in which case the inheritance tax of the State of New York was also attacked as being repugnant to the fourteenth amendment to the Constitution of the United States. This honorable court therein decided that—

> "None of the provisions of the Fourteenth amendment, United States Constitution are infringed by the provisions of the New York transfer tax law of the exercise of the power of appointment derived from the disposition of property, *made either before or after the passage of that act.* * * *
>
> A transfer or succession tax, not being a direct tax upon property, but a charge upon the privilege exercised or enjoyed under the law of the State, *does not, when imposed in cases where the property passing consists of securities exempt from taxation by Statute, impair the obligation of a contract.* A transfer tax

law which is construed as subjecting to taxation remainders created by a will before the precedent estates terminates, and *the remainders vest in possession is not in violation of U. S. Constitution Fourteenth Amendment.*"

Syllabus 278. (Italics are our own). The facts of that case briefly stated are that David Dows, Sr., a resident and citizen of the city and State of New York, died March 30, 1890, leaving a last will and testament which was duly probated April 14, 1890. The will vested the property in the executors' names during the life time of testator's son David Dows, Jr., this son to have the income during his life, and at his death the property should vest in the son's children, and the children of any heirs of the son's children deceased. David Dows, Jr., died January 13, 1899, and by his will the property was left to his three children, as provided for by his father's will. This will was also duly probated. Coler, comptroller of the city of New York, and Gilman, controller of the State of New York, thereupon filed a petition claiming the inheritance tax under the Statute of New York.

It was claimed by the plaintiffs in error that "under the law of the State of New York as it stood at the time of his death in 1890, David Dows, Sr., had a legal right to transfer by will, his property, to his grandchildren without any diminution or impairment then imposed by the law of the State upon the exercise of that right; that his said grandchildren acquired vested rights in the property so transferred; and that the subsequent law, whose terms have been above transcribed, operates to

diminish and impair these vested rights. In other words, it is claimed that it is not competent for the State, by a subsequent enactment, to exceed a price or charge for a privilege law fully exercised in 1890, and to thus take from the grandchildren a portion of the very property the full right to which had vested in them many years before." (Plaintiffs in error claim, pp. 282 and 283).

The subsequent law therein alluded to was enacted April 16, 1897, nearly seven years after the death, and probate of the will, of David Dows, Sr., and three months after the death, and probate of the will, of David Dows, Jr. The Court of Appeals of the State of New York affirmed the decision of the Surrogate's Court making the property liable to the transfer, inheritance, or succession tax, as it is variously called. From that decision a writ of error was taken from the New York Court of Appeals to this honorable Court. In an able opinion by Mr. Justice Shiras this honorable Court affirmed the decision of the Surrogate's Court and the Court of Appeals of the State of New York.

On page 284 the learned Associate Justice quotes with approval from 17 How., 456, Carpenter *vs.* Pennsylvania, and also cites Ennis *vs.* Smith, 14 How., 400; Calder *vs.* Bull, 3 Dallas, 386; Fletcher *vs.* Beck, 6 Cranch, 87; 8 Pet., 88, and 11 Peters, 421, all cases decided before the adoption of the Fourteenth Amendment, and then proceeds to discuss the alleged repugnancy of the statute of 1899 to that amendment. He quotes freely from the opinion of the present Chief Justice *in re* Kemmler, 136 U. S., 436, and cites also De Vaughan *vs.* Hutch-

inson, 166 U. S., 566; Clarke *vs.* Clarke, 178 U. S., 186; Magoun *vs.* Ill. Trust Bank, 170 U. S., 283; Knowlton *vs.* Moore, 178 U. S., 41; Plummer *vs.* Coler, 178 U. S., 115, all in support of his conclusion that the New York Statute of 1899 was not repugnant to the Fourteenth Amendment, and says:

> "In the light of the principles thus established we are unable to see in this legislation of the State of New York, as construed by its highest court, any infringement of the statutory provisions of the Fourteenth Amendment. There are involved no arbitrary or unequal regulations prescribing different rates of taxation on property or persons in the same condition. The provisions of the law extend alike to all estates that descend or devolve upon the death of those who once owned them" (p. 288).

All of which language is directly and appositely applicable to the present cause at bar.

We respectfully suggest that we have thus conclusively shown by overwhelming authority:

1st. That this Court will not review or reverse the decision of the Court of Louisiana on any question as to the construction and laws of that State, even though your honors might differ in that regard from the opinion and decision of the highest court of that State, in construing its own constitution and laws.

2d. That the inheritance or succession tax provided for by the Louisiana Constitution, and the act 45 of 1904, passed in pursuance of the power conferred by that instrument, are in nowise in contravention of the provisions of the Constitution of the United States, and that the judgment and

decree of the Supreme Court of Louisiana should be affirmed by your Honors, and the claim of plaintiffs in error be rejected at their cost. As we have already said we have not yet had access to plaintiffs in error brief a the time of writing this brief, and should their brief, when filed, require an answer, we shall at the proper time ask permission to file a supplemental brief.

All of which is respectfully submitted.

F. C. ZACHARIE,

Of Counsel for Defendants in Error.

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SUPREME COURT OF THE UNITED STATES.

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ERROR TO THE SUPREME COURT OF LOUISIANA.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

F. C. ZACHARIE,
Of Counsel for Defendants in Error.

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SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

As we stated in our original brief herein, it was prepared and in the printer's hands without our having had access to the brief of our opponents, plaintiffs in error. We now desire to reply to certain points raised and authorities cited and quoted from, as well in their brief as in their oral argument.

It is to be noted especially that Levy died May 26, 1904; the Louisiana act of 1904 was approved June 28, 1904, and

in its last clause, in the last section (6), it was provided *"that this act shall take effect from and after its passage,"* thus making it operative on June 28, 1904, and not on July 30, as erroneously stated by our opponents, this error having misled us in so stating in our original brief.

The final account and tableau of distribution was filed August 30, 1904 (Trans., p. 10), and the order promulgating it was rendered and signed August 16, 1904. On October 19 the executors filed an answer to the rule of the legatees to turn over the funds to them (Trans., p. 15), and on October 25 the proceedings to enforce the collection of the inheritance tax were filed (Trans., p. 18).

Our opponents (pp. 10 to 30 of their brief) hark back to the proposition, vainly sought to be maintained by them in the courts of Louisiana, that under the Louisiana constitution and laws the death of the testator vested rights in the legatees which could not be reached by the inheritance statute subsequently passed. They cite copiously from former Louisiana decisions and other authorities in an endeavor to maintain this proposition, which was so directly negatived in the Louisiana courts. They endeavor on pages 26 to 29 of their brief to show that the Supreme Court of Louisiana subsequently overruled their decision in the case at bar (in 40 Southern Reporter, 445; 115 La., 1025), and that, too, in face of the declaration of that honorable court, which they quote and italicize on page 29: *"The case of the Succession of Levy (La.), 39 Sou. Rep., 37, was decided from considerations peculiar to an inheritance tax, which can have no application in the instant case."* Thus the Supreme Court of Louisiana, instead of overruling its decision in the present case at bar, differentiates it from the Hutchinson case, in 115 Louisiana, and thus incidentally, as it were, reaffirms its decision in this (the Levy) case. Thus we find that, in so far as the alleged repugnancy to the constitution and laws are concerned, the highest court of Louisiana having decided that none existed, those points, as we said in our

original brief, are entirely eliminated from discussion here, as we have already shown that this honorable court will not go behind or revise the decision of the supreme court of a State in matters concerning the constitution and laws of that State, however much your honors may differ in opinion therewith.

There remains, then, only

The Federal Question

as to whether the Louisiana statute offends against the provisions of the Constitution of the United States by making the statute operative on successions then open and in course of administration at the time of the passage of the act.

We have already shown, we think, conclusively in our original brief that this honorable court has, in 17 Howard, 456, and 183 U. S., 278, distinctly and directly negatived our opponents' contention in cases directly in point with the present case at bar. Our opponents have attempted to break the force of these decisions by citations and quotations from the opinions of the Court of Appeals of New York subsequent to the New York case of Orr *vs.* Gilman.

The first case which they cite and quote from is the Pell case (171 N. Y., 48), in which the court decided that the New York act of 1899 would not apply to remainders and reversions created by a will of the decedent, who died April 14, 1863. That court decided that the New York act of 1899 was in contravention of the article and amendment to the Constitution of the United States. This decision is based upon the peculiar laws and jurisprudence of New York, which treat the rights of a *remainderman or person* as taking effect and as being *absolutely* vested at the time of the death of the testator (pages 54 and 55). This is not the law of Louisiana, for, as the judge of the district court said in this case at bar:

"If Mr. Levy's death and testament vested rights in said legatees, *those rights were subject to the administration and*

settlement of the estate, and remained involved in his succession, which up to this day is not finally closed, but, as to the things and sums devised to the particular legatees, and as to the funds to meet the inheritance tax if so ordered, is still in the hands of the executors." (See Carter Congreve *et al. vs.* City, 33 A., 816, citing State *vs.* Brown, 32 A., 1020, and Stewart case, 28 A., 180; Rec., 872, 873.)

"BUT IT MUST BE NOTICED THAT THE RULE LE MORT SAISSIT LE VIF, WHILE APPLICABLE TO HEIRS AND INSTITUTED HEIRS, HAS NO APPLICATION TO PARTICULAR LEGATEES (Rec., 940, 942); AS TO THEM, THE BASIS OF THE ARGUMENT THEREFORE WHOLLY FAILS.

"As already stated, the act 45 of 1904 was operative here July, 1904. My conclusion, therefore, is that it was not and is not retroactive as to said succession, then under administration and not yet closed; that its provisions do not affect vested rights of any person therein interested, in the sense and meaning of the constitution; that it is applicable to this succession, and that the inheritance tax levied by it must be paid before delivery, in full, to the instituted heirs or to the particular legatees" (Trans., p. 22). (The italics and capitals are our own.)

By an error in copying the transcript, we opine, the citations of his honor on the above are Rec., 872, 873, 940, and 942, when they should be Revised Civil Code of Louisiana, articles 872, 873, 940, and 942. Article 873 reads:

"The succession not only includes the *rights and obligations of the deceased as they existed at the time of his death, but all that has accrued thereto since the opening of his succession,* AS ALSO THE NEW CHARGES TO WHICH IT BECOMES SUBJECT."

Article 940 reads:

"A succession is acquired by the legal heir, who is called by law to the inheritance immediately after the death of the deceased person to whom he succeeds.

"This rule applies to testamentary heirs, BUT NOT TO PARTICULAR LEGATEES." (The italics and capitals are our own.)

So that, unlike the law and jurisprudence of New York in regard to remaindermen, the Louisiana law, by the very

text of the Civil Code (art. 872), provides that the succession is liable, not only to all the obligations as they existed at the time of the death of the testator, but all that has accrued thereto since the opening of the succession, and also the new charges to which it becomes subject, such as this inheritance tax, which is emphatically a "new charge;" so also under, article 940, R. C. C., the rule of *le mort saissit le vif* does apply to testamentary heirs, but *not* to particular legatees, as in the case at bar, their rights only being vested at the close of the succession.

R. C. C., article 1625, provides:

"Every legacy not included in the definition before given of universal legacies, and legacies under a universal title, is *a legacy under a particular title.*" (Italics are our own.)

R. C. C., article 1626, provides that the particular legatee can take possession only from the day the demand of delivery was formed, or from the day when it was voluntarily delivered to him.

R. C. C., article 1606, provides that "a universal legacy is a testamentary disposition, by which the testator gives to one or several persons the whole of the property which he leaves at his decease." So it is plain that the legatees herein are particular legatees, and as such their rights and seisin are not vested until the property bequeathed actually enters into their possession, which is not the case here.

But besides see page 22 (Trans., p. 3) of our brief and 20 Montana. The Supreme Court of Louisiana has decided that, even if vested at the time of death, it was not such a vestiture as to deprive the State of the right of taxing under the inheritance tax.

The case in 104 N. Y., 321, cited by our opponents, in our opinion at least, has no relevancy or pertinency to the case at bar. The New York case, 182 N. Y., 238, is similar to the case (171 N. Y., 48) in regard to the vested rights of remainder persons, and neither of these two cases has any application to the case at bar under Louisiana law, as we have

already shown hereinabove. The Louisiana Supreme Court (Trans., p. 38) affirmed the decision of the court *a qua*, saying:

"The right was *not absolutely vested in the heirs* free from all possible taxation, and in consequence the alleged retroactivity of the law, even if retroactive, could be of no avail as a defense against the tax (citing authorities). These legatees have unquestionably a right to the property to the extent of their respective legacies—an undisputed right subject to no demand, except that of the State in its sovereign capacity for the maintenance of the State in its sovereign capacity." (Italics are our own.)

So that the Louisiana Supreme Court, construing and interpreting the Louisiana Revised Civil Code and the jurisprudence of that State, marks the difference between the New York law in regard to remaindermen and particular legatees, showing that the inheritance act of that State violates none of the provisions of the Louisiana constitution or its jurisprudence; and, as we have already said, this court will not review or reverse that decision.

The cases cited by our opponents (166 U. S., 226; 199 U. S., 194) have no relevancy, in our opinion, to the point involved in the case at bar. Cooley on Taxation (2d ed.), page 376, says, under the heading of "Property of Decedent Estates:"

* * * "And it will continue to be taxable to the estate or its representatives *until actually distributed*, but not afterwards." (Italics are our own.)

And authorities are cited to this text in note 4. So Am. and Eng. Encyc. of Law, vol. 27, p. 352, says:

"In the absence of any express statutory direction, the better rule would seem to be that the *tax is due when the property bequeathed or devised actually vests.*" (Italics are our own.)

The same text is repeated in the sixth edition of the same work on page 667, with a number of more recent decisions supporting the text in note 4.

And again, on pages 341 and 342 of the same volume:

"The law in force at the time of the decedent governs the imposition of the tax. Neither an original nor an amending nor a repealing act can act retroactively, *so as to affect rights vested at the time of its passage, unless the act itself expressly so provides*," as the Louisiana act 45 of 1904 so provides. (Italics are our own.)

In the note (1) to the text there are cited 110 Iowa, 290; 20 Montana, 299, and Lines' Estate, 155 Penn. St., 378, and others. In 110 Iowa, 299, that court said, in relation to an amendatory act in regard to the inheritance tax passed after the opening of the succession:

"And if the original act was cured by the amendatory act, we see no reason why it should not be made to apply to estates undistributed at the time the amendatory act went into effect."

So in 20 Montana, 299, it was decided that "the section of the law which provides that it shall apply to 'all estates which have been probated before, and shall be distributed after the passage of' the act is not unconstitutional." In that case the act became a law on March 4, 1897, and the testator died May 6, 1896. The will was duly probated in 1896, and administration was had. On July 19, 1897, the district court ordered a distribution of the estate and discharge of the executors. Before this order was issued, however, the county authorities claimed the inheritance tax under the act of March 4, 1897, passed nearly a year after the death of the testator and the opening of his succession.

It was claimed by the respondents (p. 300) (as it is in the present case at bar) "that the act is repugnant to the fourteenth amendment to the Federal Constitution, in that it denies to persons within the jurisdiction of Montana the

equal protection of the laws." The Supreme Court of Montana, in an able and lengthy opinion, denied and negatived this contention, citing and quoting some twenty decisions from Federal and State authorities in support of its conclusions, and said (p. 314):

"In conclusion, our judgment is that the act is constitutional, as affecting the estate involved in this case, and that the lower court erred in holding otherwise."

155 Penn. St., 391, turns upon the question of the situs of the property on which the inheritance was claimed. Another principle in the 20th Montana case is announced on which that decision was grounded, and that is no "vested rights" can interfere with the right of the State by a retroactive act to tax the privilege or property. (See 20 Montana, pp. 311, 312, 313, 314.) This is the principle of the civil law Laurent Principes de Droit Civil Francais (Tom. I, pp. 221, 222, *et seq.*), and that, too, under article 11 of the Constitution, which provides that "no one can be deprived of his property except for a cause of public utility, in the case and in the manner established by law, and only for a just and sufficient indemnity previously paid" (sec. 147, p. 220, *ibid.*). So that under the civil law a retroactive statute in the interest of public order or public use is not unconstitutional.

All of which is respectfully submitted.

F. C. ZACHARIE,
Of Counsel for Defendants in Error.

Supreme Court of the United States.

No. 91.—October Term, 1906.

Mrs. Camille Cahen, Mrs. Julie Kahn, Eva Cahen, et al., Plaintiffs in Error,
vs.
John Brewster, Tax Collector for the Second District of the City of New Orleans, State of Louisiana, and Andrew H. Wilson, President School Board of the City of New Orleans, State of Louisiana.

In error to the Supreme Court of the State of Louisiana.

[December 24, 1906.]

Mr. Justice McKenna delivered the opinion of the Court.

The case involves the validity, under the Constitution of the United States of a burden imposed under the inheritance tax law of the State of Louisiana, passed June 28, 1904.

Mathias Levy, a resident of New Orleans, died in that city May 26, 1904. He was unmarried and left no ascendants, and was, therefore, without forced heirs. He left a last will and testament of the date of December 23, 1903, in which he named executors and made sundry particular bequests to charitable institutions. He bequeathed the balance of his estate, in equal shares, to his two nieces, Camille Cahen and Julie Kahn, constituting them thereby his universal legatees and instituted heirs.

The will was duly probated in the Civil District Court for the Parish of Orleans, May 30, 1904. An inventory of his estate was taken June 9, 1904, and a supplementary inventory August 3, 1904. The inventories showed the total appraised value of the estate to be $64,676.05. Of this amount, after deducting the debts and charges of the estate and particular legacies, there was left, as the portion going to the universal legatees, $42,927.94.

The final accounting and tableau of distribution was filed August 3, 1904, and approved and homologated by judgment August 16, and the funds ordered to be distributed.

October 16 a motion was made for a rule on the executors to show cause why they should not pay over the legacies as ordered. In answer to which the executors replied that they were willing to do so, but that it was announced to them by the president of the school board of the parish that he intended to claim in behalf of said board a tax under the inheritance tax law of the State on the funds in their hands "and the shares coming to said movers." The executors also alleged the unconstitutionality

of the tax and prayed that the school board of the parish, thorough its president, Andrew H. Wilson, be made a party to the proceedings. Wilson appeared and averred that the taxes were due the State and not to the school board, and were collectible by the State tax collector, and "that this suit and the matters at issue herein should be litigated contradictorily with the State tax collector for the district in which the deceased resided when he departed this life."

The tax collector appeared. The agents and attorneys in fact of the legatees answered the demand of the school board to be paid the tax that $10,000 of the estate was in United States bonds, and not subject to taxation by the State, and averred that an inheritance tax was not due "to said board for the reason that said act has no application to the property under this succession or the legacies due to said movers in the motion aforeforesaid; that to give it such application would be to make said act retroactive and divest the vested rights of the said movers in said rule, which would be in violation of the constitution of this State, and especially article 166 thereof, and in violation of the Constitution of the United States of America, and especially section 9 of article I, and the Fifth and Fourteenth Amendments thereof, and in violation of the laws of the State and of the land; that it would be a deprivation of property without due process of law and a denial of the equal protection of the laws, in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States of America."

Judgment was rendered in favor of the tax collector, condemning the executors to pay the tax, less the amount of United States bonds, and less the charitable and religious bequests. The judgment was affirmed by the Supreme Court of the State.

The law imposes a tax of three per cent "on direct inheritances and donations to ascendants or descendants," and ten per cent upon donations or inheritances to collaterals or strangers. It is provided that the tax is "to be collected on all successions not finally closed and administered upon, and all successions hereafter opened."*

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*SECTION 1. Be it enacted by the General Assembly of the State of Louisiana, That there is now, and shall hereafter be, levied, solely for the support of the public schools, a tax upon all inheritances, legacies and donations; provided, no direct inheritance, or donation, to an ascendant or descendant, below ten thousand dollars in amount or value, shall be so taxed; a special inheritance tax, of three per cent on direct inheritances or donations to ascendants or descendants, and ten per cent for collateral inheritances and donations to collaterals or strangers; provided, bequests to educational, religious or charitable institutions shall be exempt from this tax; and provided, further, that this tax shall not be enforced when the property donated or inherited shall have borne its just proportion of taxes prior to the time of such donation or inheritance; this tax to be collected on all successions not finally closed and administered upon, and all successions hereafter opened.

It will be observed that when Levy died May 26, 1904, and when the will was probated May 30, 1904, there was no inheritance tax in Louisiana. The act in controversy was passed June 28, 1904.

In support of the attack made upon the law, it is contended that an inheritance tax is not a tax on property but on the right or privilege of inheriting, and that the right in the case at bar had been exercised at the moment of the testator's death under the then existing law, and "to pass a law exacting such a tax and make it retroactive so as to divest a right previously acquired under then existing laws, is a deprivation of property already acquired, without due process of law, prohibited by the Fourteenth Amendment of the Constitution of the United States."

To sustain their propositions the plaintiffs in error cite certain articles of the Louisiana Civil Code.* And it is urged as indubitable that, under the law of Louisiana, a succession is acquired by the legal heir immediately after the death of the deceased, and by the express terms of the code this rules applies to testamentary heirs, to instituted heirs and universal legatees. In other words, that the acquisition of the succession by plaintiffs in

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*ARTICLE 940. A succession is acquired by the legal heir, who is called by law to the inheritance, immediately after the death of the deceased person to whom he succeeds..

This rule applies also to testamentary heirs, to instituted heirs and universal legatees, but not to particular legatees.

ARTICLE 941. The right mentioned in the preceding article is acquired by the heir, by the operation of the law alone, before he has taken any step to put himself in possession, or has expressed any wish to accept it.

Thus, children, idiots, those who are ignorant of the death of the deceased, are not the less considered as being seized of the succession, though they may be merely seized of right and not in fact.

ARTICLE 942. The heir being considered seized of the succession from the moment of its being opened, the right of possession, which the deceased had, continues in the person of the heir as if there had been no interruption, and independent of the fact of possession.

ARTICLE 944. The heir being considered as having succeeded to the deceased from the instant of his death, the first effect of this right is that the heir transmits the succession to his own heirs, with the right of accepting or renouncing, although he himself have not accepted it, and even in case he was ignorant that the succession was opened in his favor.

ARTICLE 945. The second effect of this right is to authorize the heir to institute all the actions. even possessory ones, which the deceased had a right to institute, and to prosecute those already commenced. For the heir, in everything, represents the deceased, and is of full right in his place, as well for his rights as his obligations.

ARTICLE 1609. When, at the decease of the testator, there are no heirs to whom a proportion of his property is reserved by law, the universal legatee, by the death of the testator, is seized of right of the effects of the succession without being bound to demand the delivery thereof.

error was at the very moment of Levy's death, and, therefore, necessarily before the act imposing inheritance taxes was passed. To sustain their view plaintiffs in error cite a number of cases decided prior to the decision of the case at bar, and the case of *Tulane University of Louisiana* v. *Board of Assessors et al.*, (115 La. 1026,) decided since the decision in the case at bar. Having established, as it is contended, that by operation of law that the property is transmitted immediately from the testator to the heirs, it is also contended that from the very definition of an inheritance tax none could be imposed on plaintiffs in error as legatees of Levy.

For definitions of an inheritance tax plaintiffs in error adduce *United States* v. *Perkins*, (163 U. S. 625;) *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283;) *Knowlton* v. *Moore*, (178 U. S. 41.) The tax was defined in the Perkins case to be "not a tax upon the property itself, but upon its transmission by will or descent;" and in the Magoun case, "not one on property, but one on the succession." In *Knowlton* v. *Moore* it was said that such taxes "rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested." But these definitions were intended only to distinguish the tax from one on property, and it was not intended to be decided that the tax must attach at the instant of the death of a testator or intestate. In other words, we defined the nature of the tax; we did not prescribe the time of its imposition. To have done the latter would have been to prescribe a rule of succession of estates and usurp a power we did not and do not possess. There is nothing, therefore, in those cases which restrains the power of the State as to the time of the imposition of the tax. It may select the moment of death, or it may exercise its power during any of the time it holds the property from the legatee. "It is not," we said in the Perkin's case, "until it has yielded its contribution to the State that it becomes the property of the legatee." See also *Carpenter et al.* v. *Commonwealth of Pennsylvania*, (17 How. 456.)

We must turn back, therefore, to the law of Louisiana for the solution of the questions presented in the case at bar. But we are not required to reconcile the Louisiana decisions. We accept that in the case at bar as a correct interpretation of the code of the State. Nor may we regard *Tulane University* v. *Board of Assessors* as irreconcilable with it. That case was brought to enjoin the collection of State and city taxes which had been assessed against the succession of A. C. Hutchinson. The plaintiff university was the universal legatee of Hutchinson, and its property was exempt from taxation under the constitution of the State. It is true the court said that the code of the State "left no room for doubt or surmises as to the fact of the property of a deceased person being

transmitted directly and immediately to the legal heir, or, in the absence of forced heirs, to the universal legatee, without any intermediate stage, when it would be vested in the successive representative or in the legal abstract, called 'succession.'"

But the decision in the case at bar was not overruled, but distinguished as follows: "The case of succession of Lævy was decided from considerations peculiar to an inheritance tax, and which can have no application to the instant case. This inheritance tax was held to be due notwithstanding that, under the provisions of the code, the ownership of the property passed to the heirs. The maxim, '*Le mort saisit le vif*,' was expressly recognized." Both decisions, therefore, must be considered as correct interpretations of the code of the State. It is not our province to pronounce one more decisive than the other, or to pronounce a contradiction between them, which the court which delivered both of them has declared does not exist. We must assume that the Tulane case approved the view expressed in the case at bar of the rights of legatees, as follows: "Furthermore, we have said, the legatees acquired no vested right to the property bequeathed which could enable them to successfully defend their inheritance against the demand of the State for the inheritance tax. It was property within the limits of the State, which the State could tax, for purposes mentioned, until it had passed out of the succession of the testator."

Plaintiffs in error also contended that the statute denied them the equal protection of the laws. This contention is based on the following provision of the statute: "This tax to be collected on all successions not finally closed and administered upon, and on all successions hereafter opened."

Successions which have been closed, it is said, are exempt from the tax, and a discrimination is made between heirs whose rights have become fixed and vested on the same day. Counsel say: "The closing of the succession cannot affect the question as to when the rights of the heirs vested; and cannot be a cause for differentiation among the heirs; and such a classification is purely arbitrary. Besides, such a classification rests on the theory that the tax is one on property, when in fact it is one on the right of inheritance." But, as we understand, the Supreme Court made the validity of the tax depend upon the very fact which counsel attack as an improper basis of classification. The court decided that the property bequeathed was property the State could tax, "until it had passed out of the succession of the testator." It was certainly not improper classification to make the tax depend upon a fact without which it would have been invalid. In other words, those who are subject to be taxed cannot complain that they are denied the equal protection of the laws because those who can not legally be taxed are not taxed.

Judgment affirmed.